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THE  
ONTARIO LAW REPORTS.

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CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

1903.

REPORTED UNDER THE AUTHORITY OF THE  
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JUDGES  
OF THE  
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DURING THE PERIOD OF THESE REPORTS.

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## ERRATA.

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Page 9, line 16 from bottom—For “*Re Rose* (1901), 1 Ch. 117,” read “*In re Bank of Syria, Owen and Ashworth's Claim*, [1901] 1 Ch. 115.”

Page 26, line 1 of head lines.—For “R. S. O. 1897, secs. 27, 41,” read “R. S. O. 1897, ch. 222, secs. 27, 41.”

Page 459.—The statute, 2 Edw. VII., ch. 2, is now R. S. O. 1897, ch. 333.

Page 637, line 7 of head lines.—Add ch. 13 to the reference, 3 Edw. VII. (O.).

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# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

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[BOYD, C.]

1903

March 23.

THE TORONTO GENERAL TRUSTS CORPORATION

v.

THE CENTRAL ONTARIO RAILWAY COMPANY.

RITCHIE v. BLACKSTOCK ET AL.

CENTRAL ONTARIO RAILWAY v. BLACKSTOCK ET AL.

*Railway—Bonds—Mortgage—Default in Payment—Sale of Railway—Validity*  
—46 Vict. ch. 24, secs. 14, 15, 16 (D.)

A railway incorporated by Provincial legislation, and which is afterwards declared to be a work for “the general advantage of Canada,” can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding.

Bonds of the railway were issued, and as security for their payment a mortgage of the railway was made to a trust company, containing a provision that in default in payment of the principal of the bonds, and on request of three-fourths of the bondholders, the trustee should immediately elect and declare the bonds to be due and payable and take proceedings for enforcing payment:—

*Held*, that the Act 46 Vict. ch. 24, secs. 14, 15, 16 (D.) (re-enacted by the present Railway Act, 51 Vict. ch. 29, sec. 278), although passed subsequently to the date of the mortgage, applied, and that a sale of the railway could be validly made.

*Peto v. Welland R. W. Co.* (1862), 9 Gr. 455, and *Galt v. Erie R. W. Co.* (1868), 14 Gr. 499, distinguished.

A consent judgment directing a sale of the railway was, under the circumstances of the case, vacated, and the defendants allowed to come in and defend.

THESE were two issues directed to be tried, and which came on for trial at Toronto.

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On the 24th April, 1902, an action was commenced by the Toronto General Trusts Corporation, suing on behalf of themselves and also on behalf of all the bondholders of the Central Ontario Railway Company, against that company for a sale of the railway and undertaking of the company.

The railway company was incorporated by 36 Vict. ch. 73 (O.), under the name of the Prince Edward County Railway Company. Subsequently Acts were passed from time to time amending such Act of incorporation; and by 47 Vict. ch. 60 (D.), the railway was declared to be a work for the general advantage of Canada.

By one of these amending Acts, 45 Vict. ch. 61 (O.), the name of the company was changed to that of the Central Ontario Railway Company, and the company was authorized to issue bonds, and create a mortgage on the company's railway, its lands, tolls, revenues, franchises and all other property, real and personal, belonging to the company, as security for the payment thereof, in accordance with the provisions of sub-sec. 11 of sec. 9 of the Railway Act of Ontario, R.S.O. 1877, ch. 165.

The bonds were issued and a mortgage made, bearing date the first day of April, 1882, by the railway company to the Trust Corporation, as trustees, payable in twenty years after the date thereof, to secure the payment, with interest at six per cent., of the bonds to the amount of \$2,200,000.

The mortgage provided that, in case of default in payment of the interest to the Trusts Corporation of any of the bonds, and in case such default should continue for three months, it should be lawful for the trustees, and, on the request of holders of said bonds to the amount of 75 per cent. thereof, it should be the duty of such trustees, to enter in and upon the premises by the mortgage conveyed and every part thereof, and to hold and use the same for the benefit of the holders of the bonds, to pay the interest thereon, and the expenses of operating the railway and conducting the business thereof, making repairs, etc., and after paying all necessary expenses, and reimbursing and indemnifying themselves against all costs, charges, etc., to pay the interest on the said bonds.

In case of default in the payment of the principal of bonds, the trustees, at the request of the bondholders to the number

and amount aforesaid, should immediately elect and declare the said principal of all said bonds to be due and payable, and should take proceedings to enforce payment of the principal of all said bonds and the interest unpaid as speedily as possible, instead of operating the railway and conducting the business thereof, as provided for in case of default in payment of the interest.

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It was alleged that default had been made in the payment of the principal and interest due upon said bonds, and that the trustees had been requested by bondholders owning debentures exceeding 75 per cent. of the total amount thereof to take proceedings to enforce the mortgage, and proceedings were accordingly taken by the issuing of the writ.

On May 29th, 1902, on motion for judgment on the pleadings, judgment was given directing a sale of the railway, etc.

In pursuance of the judgment, the railway was advertised for sale, the sale to take place on the 10th September, 1902.

On a motion made by Samuel J. Ritchie, an order was made on 10th September, 1902, postponing the sale until the 15th October, 1902.

Subsequently, after some correspondence between Mr. Ritchie, and by his solicitors on his behalf, and the solicitors for the railway company and the Trusts Corporation, it being claimed by Mr. Ritchie, and on his behalf, that the action had been commenced and the proceedings carried on by persons who pretended to act on behalf of the railway company, fraudulently using stock and bonds belonging to him, the object being to cause the railway to be put up for sale, when it would be bought in by parties interested in the scheme, and he, Ritchie, thereby deprived of his rights and interest therein, a motion was made by the Trusts Corporation to the Court asking for the advice and direction of the Court as to the power of the Trusts Corporation to sell the railway.

On October 9th an order was made directing the trial of an issue, wherein Samuel J. Ritchie was to be the plaintiff and Thomas G. Blackstock and Robert Waddell, who claimed to be the parties who were really interested in the railway, were to be the defendants, as to whether the judgment was

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obtained by fraud, or for any other reason, should be set aside, and that the sale should be postponed until the 1st December, 1902.

On 21st October, 1902, a petition was presented in the said action to the Court, based on the affidavit of Mr. Ritchie, in which it was claimed that the action had been commenced and the judgment obtained, in fraud of himself as a bondholder and shareholder, claiming that he represented the majority in value of the bondholders and shareholders, setting out the particulars of the fraud, and asking that the judgment should be set aside, and that the railway company should be allowed to defend the action.

On the 3rd November an order was made directing that the petition be referred for trial at the next sitting of the Court, and an issue was directed whether the judgment should be vacated in whole or in part; and it was also ordered that T. G. Blackstock and Robert G. Waddell should be at liberty at the hearing of the petition and issue to object that it was being prosecuted without the sanction or authority of the railway company.

The two issues accordingly came on for trial before BOYD, C., on March 16th, 1903, and following days.

*D. L. McCarthy*, for the Toronto General Trusts Corporation.  
*Walter Barwick*, K. C., *A. B. Aylesworth*, K. C., and *J. H. Moss*, for S. J. Ritchie.

*W. R. Riddell*, K. C., *T. P. Galt*, and *R. McKay*, for T. G. Blackstock and Robert Waddell.

March 23, 1903. BOYD, C.:—The important question here discussed was, whether the judgment directing a sale of the railway was well founded in law. The Central Ontario Railway Company, of provincial incorporation, has been declared to be a work for the general advantage of Canada, and has been since 1884 subject to the law of the Dominion (47 Vict. ch. 60 (D.)).

In 1882 the company made the issue of first bonds, now sought to be enforced under statutory powers, by which the lands, tolls, revenues, franchises, and other property, real and



personal, of the railway company were hypothecated, mortgaged, and pledged in security for the due payment of the amount of the bonds (45 Vict. ch. 61, sec. 7 (O.), and R. S. O. 1877, ch. 165, sec. 9, sub-sec. 11). The form of the transaction was that the issue of these mortgage bonds was secured by a deed of trust, whereby was conveyed to the Toronto General Trusts Corporation, the railway, its lands, rolling stock, present and future property and effects, franchises and appurtenances, subject to the payment of the working expenses of the railway. This mortgage conveyance was subject to conditions before default and after default in payment. The condition now relevant is that which applies to default in payment of the principal of the bonds. Then upon request of the bondholders, representing seventy-five per cent. in amount, the trustees shall elect and declare all the bonds to be due and payable, and shall take proceedings to enforce payment of the principal of the bonds as speedily as possible, instead of operating the road and conducting the business thereof, as is provided in case of default being made in the payment of interest.

That is, if default is made in the principal moneys, the trustees are to intervene, not to take control of the road for the purpose of conducting the business, but are to take proceedings in the courts to enforce payment. The suit has been rightly instituted under these requirements.

Now, the situation of the bondholder as chargee of the land of the railway was first considered in this province by Spragge, V.-C., in *Galt v. Erie R. W. Co.* (1868), 14 Gr. 499. He pointed out that the cases of mortgagees of railways in England do not apply, as there only the "undertaking" is involved, which is something exclusive of the land (p. 501). He then proceeds thus, at p. 507: "There is room for the contention, that the authorization by the Legislature of a mortgage of land on which a railway is built, generally, without restriction as to the mode of enforcing it, carried with it the right to all the remedies to which a mortgagee of ordinary private property is entitled. I have considered this point, and I think that the proper view is that the Legislature did not mean to give any new remedy against the railway company." And he concludes for the same reasons which guided Esten, V.-C., in an earlier

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case respecting the rights of judgment creditors of a railway (*Peto v. Welland R.W. Co.* (1862), 9 Gr. 455) that the railway could not be sold by the court, because the vendee could not exercise the franchise, that is, conduct and operate the railway. I quote again the language of Spragge, V.-C., at p. 508: "The remedy to creditors was restricted" (*i.e.*, by the court), "because it was conceived that they ought to be subordinated to the public interests, and that the power to acquire lands was conferred, with the intent that they should not be limited or alienated to any other purpose, and these reasons applied with the same force to charges created by contract, as to charges *in invitum*."

In the province of Quebec, under the same legal situation, it was held by the majority of the court that the mortgagee creditor of a railroad had the right by judicial process to sell the road to satisfy his claim, and that considerations of public policy did not interfere with this right conferred in effect by his contract.

This decision was, in 1879, by the Court of Queen's Bench: *Corporation of Drummond v. South-Eastern R.W. Co.*, 24 L.C. Jur. 276. The dissentient Judge proceeded on the doctrine of *Gardner v. London, Chatham and Dover R.W. Co.* (1866-7), L.R. 2 Ch. 201, which is practically the same as that enunciated in the early cases in Grant; but the majority distinguish it because of the land being pledged in the Canadian case and not in the English case; and argue that the legislature, having given the right to mortgage the lands, have by reasonable implication sanctioned the realization of that mortgage in the usual way. It is of fair inference in this case to say that the bondholders were promised more satisfaction in case default was made in the payment of the principal than if default occurred as to the interest—in the latter case, the receipt of the earnings; in the former case more than that, *viz.*, the enforcement of payment of the principal as *speedily as possible, i.e.*, by sale.

In 1886 the Court of Queen's Bench in Quebec decided that a railway is an indivisible thing, and can only be sold as a whole: *Stephen v. La Banque d'Hochelaga* (1886), M. L. R. 2 Q.B. 491.

Ramsay, J., discusses the *Drummond* case, above cited, and says: "The question was whether a railway could be sold at the suit of the holder of mortgage bonds made in conformity with a statute, allowing the railway to be mortgaged to secure payment of these bonds; and we held that it could be sold. In England, under a statute somewhat similar to ours, the courts have always held that it was the railway as a railway that was mortgaged, and that the sale could not operate to the destruction of the corporation. We fully recognized that is what the statute should have said; but we felt that under the terms of our statute such an interpretation would destroy the security given to the bondholder by the statute, and therefore we held that the railway could be seized in execution of a judgment obtained by the bondholder. . . . Since our judgment . . . Parliament . . . recognizes the power to take in execution of a judgment obtained at the suit of a bondholder, the whole or a section of a railway specially mortgaged for the payment of the bonds, and provides what the effect of this sale shall be: 46 Vict. ch. 24, secs. 14, 15 and 16:" p. 495.

That statute, passed by the Parliament of Canada in 1883, applies to this road and to these bonds, though they were made the year before. It provides for the sale of a railway to a purchaser not having corporate powers where (1) the sale is under the provisions of any deed of mortgage; or (2) at the instance of the holders of any mortgage bonds or debentures for the payment of which any charge has been created thereon; or (3) under any other lawful proceeding.

This enactment does not enlarge the contract in the way of giving new rights, but is of a remedial nature which may well be applied for the benefit of existing engagements. The effect of a judicial sale of the road is thus not to work destruction to the concern, but to continue its operations by a new owner under sanction of governmental license or legislative authority: see *Shepley v. Atlantic and St. Lawrence R.W. Co.* (1868), 55 Me. 395, at p. 407; and *Bickford v. Grand Junction R.W. Co.* (1877), 1 S.C.R. 696, at p. 738.

These sections were commented on by Lord Watson, in *Redfield v. Corporation of Wickham* (1888), 13 App. Cas. 467,

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at p. 476, as clearly shewing that the Dominion Parliament has recognized the rule that a railway may be taken in execution and sold in ordinary course of law.

The reason of this decision rests on the fact that "the legislature had made provision for the transfer of these undertakings:" *per* Lord Watson in *Gray v. Province of Manitoba*, shorthand notes in P.C., p. 14.

This legislation, by which on a sale the utility of the railroad is preserved, seems to me to displace the sole reason which induced the courts of this Province to decline to order a sale. The restriction of the courts' process was not because of any immunity enjoyed by the railway corporation, but because of certain considerations of public policy for the protection of the community, which have now lost their force.

In brief, the Legislature permits a mortgage of the lands of the company. The right of such a mortgagee is to enforce his security by a sale of the land. There is now no countervailing right on the part of the public based upon the policy of the Legislature to prevent a sale being had; for before and after the sale the road will still run its course and serve the public as when in the hands of the original corporation.

For these reasons, briefly expressed, I find no error in law in the judgment to sell the road. But because of the importance of the contest, and as a favour to the company, I vacate the consent judgment, and allow an amendment of the pleadings to set up this defence in law as of the 20th March, and I now give judgment upon that amended record directing a sale of the road. This relief can only be granted upon payment of all costs occasioned by the application of the company to be allowed to defend.

As to the form of judgment, it should be referred to the Master to inquire who were the debenture holders, and what is due to each of them, and to sell the road to satisfy their claims. If there is undue delay in taking the accounts, leave is given to apply to expedite the sale, the rival bondholders to have the right to attend on settling of advertisement and conditions of sale, and to have leave to bid (though this is perhaps not necessary to be incorporated in the judgment). The costs heretofore occasioned by advertising the immediate sale to be paid by the company as a part of the costs above referred to.



So far as the attack made upon the proceedings is based upon fraud or other like ground, it fails, and I dismiss that branch of the litigation, with costs to be paid by Ritchie.

There is another branch of contestation involving the status of directors, and as to who is the solicitor of the Ontario Central Railway. Having regard to this judgment, and the fact that the receiver already appointed will continue in force till the sale, and is a person satisfactory to all the litigants, it does not appear to me essential to make nice critical discrimination as to legal rights in the present directorate. The voice of the shareholders has been heard, and the large majority are in favour of what I may call the Ritchie nominees, and they ask for this amendment.

The normal body of directors of this company is seven, of whom four form a quorum. By the resignation of the four directors, whose places became vacant on the acquisition of Paynes' interest by Ritchie, there were but three left—less than a quorum. According to *Newhaven Local Board v. Newhaven School Board* (1885), 30 Ch. D. 350, three being less than a quorum, were unable to transact any business, or even to fill the vacancies.

Under a direction that "the continuing directors might act notwithstanding any vacancy in their body," it was held that less than a quorum might validly act: *Re Rose* (1901), 1 Ch. 117. That is a more helpful provision than is found in the Railway Act providing for vacancies to be filled by death, etc. But if such appointment is not made, such death, absence or resignation shall not invalidate the acts of the remaining directors: 61 Vict. ch. 29, sec. 51. That is, though the body of directorate may not be complete, that shall not invalidate the action of those who remain. But should not those who remain be sufficient to form a quorum? Section 54 says that the act of a majority of a quorum shall be deemed the act of the directors; and section 53, the directors at any meeting at which not less than a quorum are present shall be competent to use and exercise all or any of the powers vested in the directors. This later provision seems to require at least a quorum to exist and be present before effective action can be taken. My strong impression is that neither set of directors can claim to represent

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the company as a matter of legal right; but it is not necessary in order to substantial justice to decide this. And as to this contest for the controlling directorate, I make no order, and give no costs.

I have not failed to consider, in exercising my discretion, that Mr. Ritchie has expended time, energy, and resources in the development of this enterprise, and he should have a fair chance of obtaining the best return that can be had from the undertaking.

If the plaintiffs, the trustees, cannot collect the costs now given them in any other way, they should receive these costs from the funds of the railway company.

G. F. H.

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[BRITTON, J.]

## RE THE ONTARIO POWER COMPANY OF NIAGARA FALLS

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*Constitutional Law—Statutes—Dominion Legislation—Preamble—“Work for the general advantage of Canada”—Public Property—Expropriation of private land.*

The preamble to an Act of the Dominion Parliament recited, that it was desirable for “the general advantage of Canada” that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the Province of Ontario, with the object of promoting manufacturing industries and inducing the establishment of manufacturing and other businesses in Canada; and the Act then expressly authorized the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts extending beyond the limits of the Province, which Act was subsequently amended by the Dominion Parliament and recognized by the Legislature of Ontario:—

*Held*, that the preamble showed by implication the intention of Parliament to give the power to deal with public property of the Dominion and to expropriate private property in the Province, and the reason for doing so; and was a Parliamentary declaration that the formation of the company for the purposes mentioned was for “the general advantage of Canada.”

THIS was a motion by the company for possession of certain lands in the village of Chippewa, which they desired to expropriate for the construction of their canal and hydraulic tunnel.

The owner of the lands had commenced an action to restrain the company from proceeding with pending proceedings for expropriation, and notice of motion for an injunction had been given.

By consent this motion was considered a motion for judgment in that action.

A chamber motion for leave to pay the amount awarded for these lands, less the costs of arbitration and award, was also by consent to be determined.

Pursuant to the order of Street, J., made because the validity of the statutes 50 & 51 Vict. ch. 120 (D.), and amending Acts, was called in question, notice was served upon The Minister of Justice for Canada, and the Attorney-General for Ontario, but neither was represented on the argument.

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The motion was argued on February 3rd, 1903, before Britton, J.

*Walter Cassels*, K.C., and *F. W. Hill*, for the motion. The company wishes to pay the value of the lands, as found by an award, into Court and to get possession of them. The works to be constructed by the company are for the general benefit of Canada, and the company has power to expropriate the lands under the authority of their Act, which was passed in 1887, (50 & 51 Vict. ch. 120 (D.)). The company has been recognized by the Dominion Parliament in statutes 54 & 55 Vict. ch. 126; 56 Vict. ch. 89; 62 & 63 Vict. ch. 105; 63 & 64 Vict. ch. 113; and 2 Edw. VII., ch. 86, as well as by the Ontario Legislature in 62 Vict. ch. 11, sec. 36 (sess. 2); so that even if the Dominion Parliament has not given expropriatory rights, there is authority from the Ontario Legislature. The Dominion Parliament has full power and jurisdiction where the works are for the general benefit of Canada, and that has been declared in the preamble as well as demonstrated by the objects of the Act for which incorporation was granted; B.N.A. Act, sec. 92, sub-sec. 10 (c). Power is also given in sections 1 and 2 to interfere with both the Niagara and Welland Rivers, which are navigable waters, and that brings this company under sub-sec. 10 of sec. 91, B.N.A. Act. The Privy Council has decided that the Dominion Parliament has jurisdiction where the matters dealt with extend beyond Canada.

*H. S. Osler*, K.C., contra. The Dominion Parliament have no power to confer rights on the company to interfere with property and civil rights, and a mere recital in the preamble of the Act is not a declaration that the company or its objects are for the general benefit of Canada. The recital is the incorporation of a company to use the waters, not *this* company specially. The works are purely local, and even if the Act was declared for the general advantage of Canada, that would not withdraw them from the jurisdiction of the local Legislature: *per Street, J.*, in *City of Toronto v. Bell Telephone Company of Canada* (1902), 3 O.L.R. 465 at p. 473.

*Cassels*, in reply. When the Dominion Parliament purport to legislate, it is presumed they have the power. The Ontario

Legislature has power to incorporate companies with Provincial objects only. I refer to *Tennant v. The Union Bank of Canada*, [1894] A.C. 31.

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May 11. BRITTON, J.:—Mr. Osler's objections may be fairly stated as and included in the following:—

1. That this company's charter, being by Dominion legislation, can give no right to expropriate private property, because the work authorized is a local work, coming under sec. 92 of the B.N.A. Act, and it has not been declared by the Parliament of Canada to be for the general advantage of Canada, as provided by clause (c) of sub-sec. 10 of that section.

2. That the plan filed is of a work not authorized by the Act.

3. That the work for which the land in question is to be taken is not indicated by the plan.

4. That there has been an abandonment of the work as authorized, no work having been done on the ground; and

5. That the award is bad on its face, as it does not shew that the land was required

The main objection, and on which Mr. Osler strongly relied, is the first. And, as to this, I inferred from what took place on the argument, the parties will not be satisfied until the opinion of the Court, of last resort, is obtained, so I will refrain from giving at length my reasons for not giving effect to the minor objections, and deal specially with the first.

The company was incorporated by 50 & 51 Vict. ch. 120 (D.).

The preamble to the Act is as follows: "Whereas it is desirable, *for the general advantage of Canada*, that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland Rivers, with the object of promoting manufacturing industries and inducing the establishment of manufactories in Canada, and other businesses;

"And whereas the persons hereinafter named, and others, have, by their petition, represented that the incorporation of the company hereinafter named, with the powers set forth, will effect the aforesaid objects, and also that the contemplated

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works will interfere with the navigation of the Welland River, and have prayed for the incorporation of the said company;

“And whereas it is expedient to grant the prayer of the said petition.”

Then follows the enacting part.

Section 1 constitutes certain persons a body corporate “under the name of ‘The Canadian Power Company,’ with full power to construct, equip, maintain and operate a canal and hydraulic tunnel from some point in the Welland River, at or near its conjunction with the Niagara River, to a point or points on the west bank of the Niagara River, about or (north) of the whirlpool, with all such works . . .

“Provided, however, that none of the works authorized by this Act, shall be commenced until the plans thereof have been submitted to the Minister of Railways and Canals, and his sanction thereto has been obtained.”

Section 2 gives this company power to contract with any bridge company, having a bridge across the Niagara River, to carry wires across and to connect them with the wires of any electric light company, or other company, in the United States.

Section 27 provides for making plans, surveys, etc.

Section 29 makes certain sections of the Railway Act (then R.S.C. ch. 109) to apply, the same as if specially set out in the Act.

Section 30 prevents any of the work being done within the limits of the Niagara Falls Park reservation without the consent of the proper authorities.

Section 32 makes applicable to this company ch. 92 of the Revised Statutes of Canada. That statute has reference to works on navigable waters.

Is it necessary, considering the object of the Act, the subject matter dealt with, and how the corporate powers are to be exercised, that there should be the express declaration by the Parliament of Canada that the works are for the general advantage of Canada?

I do not think it is.

1. This Act authorizes the company to contract with any bridge company to carry wires for electric light or other purposes, and to connect the same with a company in the



United States. That brings the work under the exception in Division *a* of sub-sec. 10 of sec. 92 of the B.N.A. Act. That exception withdraws from Provincial legislative power any local work or undertaking extending beyond the limits of the Province.

2. This Act deals with navigable rivers. The works as stated in the Act may interfere with the navigation of the Welland River. Navigation is specially reserved by sub-sec. 10 of sec. 91 of the B.N.A. Act for Dominion legislation.

3. This company, to do the work contemplated, must have power to deal with property—"public property"—of the Dominion. Sec. 91, sub-sec. 1, of the B.N.A. Act confers exclusive legislative authority upon the Dominion in such cases.

By sec. 108 of B.N.A. Act, *the public works* in provinces in the 3rd schedule shall be the property of Canada; and in this 3rd schedule are canals and lands and water connected therewith, and rivers. Rivers are, in that sense, "public property."

But the Welland River is not only under the control of the Dominion as a "river," and as a "navigable river," but by the Consolidated Statutes of Canada, 1859, ch. 28, sec. 10, schedule A, this river is made, from its commencement at Port Robinson to its mouth, public property.

If the Dominion Parliament has authority to grant the powers claimed, it is a case of "over-lapping powers," and Mr. Lefroy's proposition 37, in his work on "Legislative Power," is applicable. See also pages 350, 351, 425 to 468, of that work, and the cases cited.

If the Dominion, and Dominion only, has power over the source of supply of water, the thing of use to the company to be chartered, then the Dominion has, of necessity, power to deal in detail with what is necessary to utilize the water supply for purposes beneficial to Canada: see *Tennant v. The Union Bank of Canada*, [1894] A.C. 31; *The Attorney-General of Ontario v. The Attorney-General for the Dominion of Canada*, [1894] A.C. 189; *Regina v. County of Wellington* (1890), 17 A.R. 421, at p. 444.

As to this constitutional question, I cited some authorities in *Bradburn v. The Edinburgh Life Assurance Co.* (1903), 5 O.L.R. 657, which are applicable here.

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The points decided in *City of Toronto v. Bell Telephone Co. of Canada*, 3 O.L.R. 465, are very different from those in the case under consideration now.

But, assuming that it is necessary that there should be a declaration by the Parliament of Canada that these works are for the general advantage of Canada, is there not substantially such a declaration in the preamble of the Act of incorporation?

The preamble states, although in a clumsy way, that it is for the general advantage of Canada that the natural water supply of the Niagara and Welland rivers should be utilized for factories and "businesses" in Canada, and that a company should be formed to utilize that water, and the Act creates that company. So the works to be made by the company are intended to be, and I think are, declared to be for the general advantage of Canada.

Taking the preamble as a declaration is not construing the statute. It is not an attempt to cut down or enlarge the language of the Act. The preamble shews the intention of Parliament to give the power and the reason why, and that reason is a parliamentary declaration.

Again, may there not be a declaration by implication, or, so far as all parties interested are concerned, what would amount to a declaration?

The Act itself in the provisions above referred to, in giving to the company all the powers of a railway company under the Dominion Railway Act, expressly gives the right to expropriate. Legislation by the Dominion, subsequent to the act of incorporation; and, as to some of the Acts, subsequent to some work being done, is a matter fairly to be considered if we can look for a declaration apart from the express words of the statute.

The Act of incorporation was amended by 54-55 Vict. ch. 126 (D.); 56 Vict. ch. 89 (D.); 62-63 Vict. ch. 105 (D.); 63-64 Vict. ch. 113 (D.); 2 Edw. VII., ch. 86 (D.).

Then this Dominion legislation has been recognized by the Provincial Parliament.

62 Vict. ch. 11, sec. 36 (O.), (sess. 2) authorizes the commissioners of the Queen Victoria Niagara Falls Park to make agreements with companies in reference to taking water from the Niagara and Welland rivers. These commissioners have made

agreements with this company, dated 11th April, 1900; 15th August, 1901; and 28th June, 1902.

There is no evidence of abandonment of the work. On the contrary, there has been an expenditure of over \$40,000—there is the agreement in force by which the company has to pay to the commissioners of Niagara Falls Park \$15,000 a year for the right to discharge waters through the proposed canal and through the lands of the park into the Niagara River. There is evidence that this company has entered into an agreement with a company in the State of New York for the delivery of electrical power to be generated by the work under consideration. Plans and surveys have apparently been approved of by the Department of Railways and Canals at Ottawa, and deposited as required by law. No steps were taken to oppose the company's operations until they attempted to get possession after the award.

I think the objections now should not prevail.

The motion for the injunction must be dismissed, and the action dismissed. An order is to go for leave to pay the money into Court, and for possession. Costs of this application and motion to be paid by Hewson to the company.

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May 26.

*Registry Laws—Certificate of Allowance of Petition Under Partition Act—Lien of Execution Creditor—Expiry of Writ—Preservation of Lien—Notice—Bonâ Fide Purchaser for Value—Priorities.*

In proceedings for partition under the Partition Act by a tenant in common, the fact that a judgment creditor having a fi. fa. against the lands of another tenant in common in the hands of the sheriff is made a party respondent to the petition and that an order allowing the petition has been made and a certificate thereof registered is not sufficient to preserve a lien on the debtor's undivided share, the fi. fa. having in the mean time expired before some Act or declaration of the Court had recognized his claim as an existing one against the lands.

The allowance of a petition has not the force of a judgment or order establishing the claims of any of the parties.

At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a *bonâ fide* purchaser for value :—

*Held*, that the company's lien was not preserved by the proceedings taken before the conveyance to G., and that she was not affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands.

An appeal by defendants the Michigan Clothing Company from the report of a Master in a partition proceeding begun by petition under R.S.O. 1897, ch. 123. The facts are stated in the judgment.

The appeal was heard in the Weekly Court by Moss, C.J.O., sitting for a Judge of the High Court, on the 9th April, 1903

W. M. Douglas, K.C., for the appellants.

Grayson Smith, for the defendant Mary E. Gamble, the respondent.

May 26. Moss, C.J.O.:—At the date of the filing of the petition for partition herein the Michigan Clothing Company were entitled to a general lien upon the undivided estate or interest of the defendant Charles A. Loughin in the lands described in the petition by virtue of a writ of execution against goods and lands in the hands of the sheriff. And the



petitioner made them parties defendants to the petition in respect of such lien.

The lien was still subsisting at the date of the allowance of the petition on the 14th June, 1899. Pursuant to sec. 29 of the Partition Act, a certificate of the allowance of the petition was registered in the registry office on the 16th June, 1899. The Michigan Clothing Company's writ of execution, not having been renewed, expired in the sheriff's hands on the 25th February, 1900. By two conveyances dated the 24th April, 1900, and the 25th April, 1902, respectively, the defendants Charles A. Loughin and Martha A. Loughin, his wife, granted and conveyed all their estate and interest in the lands to one Mary E. Gamble.

An order for sale in lieu of partition of the lands was made on the 3rd December, 1901. On the 31st December, 1901, they were sold to a purchaser, and subsequently the purchase moneys were paid into Court.

On the 20th May, 1902, an order was made adding the above named Mary E. Gamble as a party to the proceedings with respect to any right, title, claim, or interest she might have in the proceeds of the sale. On the 9th June, 1902, the Michigan Clothing Company placed an alias *fi. fa.* in the sheriff's hands, and thereafter the local Master proceeded to ascertain the respective rights and equities of the parties.

The company claimed payment to them of the portion of the purchase moneys attributable to Charles A. Loughin's interest, and to be entitled thereto notwithstanding the conveyances to the defendant Mary E. Gamble. It was shewn that the company had not been paid the amount of their judgment debt, and that the failure to renew the *fi. fa.* was through oversight and inadvertence. On the other hand, the local Master found that the defendant Mary E. Gamble was a *bonâ fide* purchaser for value, and held her entitled to the moneys.

The question on this appeal is whether the filing of the petition, the order of allowance, and the registration of the certificate of allowance operated to preserve the company's lien and rights against the lands so as to dispense with the renewal of the writ of *fi. fa.*

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The certificate of allowance of the petition is clearly "an instrument" within sec. 2 (1) of the Registry Act. It is a certificate of a proceeding in a Court, and under sec. 92 of the Act the registration thereof constituted notice to all persons claiming any interest in the lands subsequent to such registration.

If, therefore, the company's lien was preserved by the proceedings taken prior to her purchase, the defendant Mary E. Gamble was affected with notice of the lien at the time of the conveyance to her.

It is proper, though not compulsory in the first instance, to make a person having a lien on the estate or any part thereof, by decree, mortgage, or otherwise, a party to the proceedings. If a person having a lien on the undivided share of a person interested in the lands is made a party, his lien is confined to such share. But failure to make him a party in the first instance does not impair or affect his lien: sec. 21. And in either case he is left to make proof of his claim at a future stage. The exact effect of the allowance of the petition is not declared by the Act, but I think it is clear that it has not the force of a judgment or order establishing the claim of any party. Upon the allowance the parties shall and may appear, and by a concise statement of facts by way of defence, and further according to the practice of the Court, shew title as to the proportion which they or any of them claim of the premises: secs. 31, 32. If none of the parties answer within 15 days next after service of the order of allowance of the petition, the petitioner shall be at liberty to sign judgment of partition and proceed as directed: sec. 34. Where a sale is determined upon, inquiries and proceedings are directed for the purpose of ascertaining and settling the claims of creditors or persons having liens or incumbrances: secs. 44, 45, 46.

And this inquiry should extend not merely to the existence of liens at the date of the filing of the petition, but to the time when the reference is being proceeded with: *Robson v. Robson* (1884), 10 P.R. 324.

The allowance of the petition seems to operate to no greater extent than to declare the regularity of the proceeding and to enable the petitioner to give notice of the *lis pendens* by registration of the certificate and to call upon the other parties

to the petition to make answer if so advised. It does not, nor does registration thereof, determine anything as to the rights of the parties or dispense with proof of the title to and claims against the land.

In *Yale v. Tollerton* (1866), 2 Ch. Ch. 49, Vankoughnet, C., held that a judgment creditor, having obtained a decree in Chancery for equitable execution by sale of his debtor's interest in certain lands, while executions against lands were in force in the sheriff's hands, was not required to keep the executions renewed in order to preserve his rights. This decision is said to have been affirmed by the full Court on rehearing. See *Wilson v. Proudfoot* (1868), 15 Gr. 103, at p. 107. The reference to 13 Gr. 302 is incorrect. The decision of the full Court does not appear in Grant's reports or elsewhere that I can discover.

Vankoughnet, C., also held, in another case, that the filing of a bill in Chancery to enforce equitable execution of a judgment was equivalent to a seizure at law: *Ex relatione* Mowat, V.-C., in *Wilson v. Proudfoot*, supra. The facts are not shewn, but it must have been a case in which there could have been no execution of the *fi. fa* by the sheriff.

In *Yale v. Tollerton* the interest sought to be made available by the execution creditor was such as could not be taken or sold by the sheriff under the writ of *fi. fa.*, and resort to equity was necessary in order to render it available.

That being so, there seemed no good reason after a decree had been obtained for continuing in the sheriff's hands a writ under which he could take no effectual proceeding. As much had been done to constitute an inception of a seizure under the *fi. fa.* as the nature of the case permitted. *Vide Doe Tiffany v. Miller* (1850), 6 U.C.R. 426; *Bradburn v. Hall* (1869), 16 Gr. 518.

It is important to note that in *Yale v. Tollerton* the execution creditor not only instituted the proceedings—was the actor in them—but carried them to decree during the currency of the writ.

In the present case the Michigan Clothing Company were not the actors in instituting the partition proceedings. And they do not appear to have done anything toward establishing

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their claim in the proceedings until long after the expiry of the *fi. fa.*

During its currency they took no step to preserve their rights. They put in no answer or concise statement of facts shewing their claim under sec. 31 of the Act. When the order for sale was pronounced they had not proved their claim, and their *fi. fa.* was spent. And until an order for partition or sale was obtained there was nothing to prevent the petitioner from dismissing the petition. The petitioner was *dominus litis*, and the proceedings had not attained the stage at which the company could prosecute them: *Handford v. Storie* (1825), 2 S. & S. 196; Taylor's Chancery Orders (notes to Order 184) p. 210.

I think the company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands. The lien which the writ of execution had created was gone before the proceedings had become effectual to preserve it, and in the meantime the rights of the defendant Mary E. Gamble as a *bonâ fide* purchaser intervened.

The appeal is dismissed with costs.

E. B. B.

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[IN CHAMBERS.]

THE NORTHERN ELEVATOR CO. V. THE NORTH-WEST  
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June 18.

*Security for Costs—Notice of Payment in—Time—Noting Pleadings as Closed—  
Con. Rules 346, 1204, 1207.*

When a plaintiff having complied with an order for security for costs by paying the prescribed sum into Court, gives notice of such payment in, as required by Con. Rule 1207, the defendant is entitled to at least one day to ascertain if such payment in has really been made, and to file his defence, before the plaintiff can note the pleadings as closed.

THIS was a motion by the defendants to set aside the noting of the pleadings as in default, and for leave to defend, with costs, under the circumstances mentioned in the judgment of the Master in Chambers.

The motion was argued before the Master in Chambers on June 17th, 1903.

*C. A. Moss*, for the defendants.

*W. E. Middleton*, for the plaintiffs.

JUNE 18. THE MASTER IN CHAMBERS:—The point for decision in this case is the construction of Rules 346, 1204, and 1207. The question arises under the following circumstances, the facts not being in dispute:—

The statement of defence was due on June 9th. On the previous day the defendants' solicitors, who reside at Sarnia, instructed their agent at Sault Ste. Marie to take out a præcipe order for security for costs.

This order was complied with by the plaintiffs, who, on the following day, paid \$200 into Court, and gave notice thereof to defendants' solicitors at 5.30 p.m. on June 10th. They at once telegraphed to their agent at Sault Ste. Marie to file defence, which had been in his hands for a week awaiting further instructions. This telegram was received at Sault Ste. Marie at 10.15 a.m. of the 11th. On attending at the office of the local registrar to file the statement of defence, it was found that about an hour previous the plaintiffs' solicitors had noted the pleadings as closed.



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Mr. C. A. Moss, for defendants, now moves for an order setting aside the noting of the pleadings as in default, and for leave to defend, with costs.

Mr. W. E. Middleton, for plaintiffs, shewed cause. He contended that Rule 1204 must govern, which provides generally that "proceedings shall be stayed from the service of the order until security is given;" and that as soon as given, the stay was at once removed. In that view, the plaintiffs were entitled to act as they did.

Mr. Moss contended that Rule 1204 must be read in connection with Rule 1207. This provides solely for the case of payment of money into Court as security for costs. It directs that "the party paying in the money *shall* . . . forthwith serve a notice upon the opposite party specifying the fact and purpose of such payment." He argued that this notice was part of the necessary procedure, and took the place of allowance of a bond when filed in similar cases.

I think the motion must be allowed. As I read the rules applicable to this question, as soon as the order was issued on the 8th a stay took place. Service of notice of payment into Court was not made until after four p.m. on the 10th, which was only equivalent to service on the 11th. If I were obliged to take that position, I would hold that the defendants had all the 12th on which to file their defence. At any rate, the plaintiffs acted prematurely in noting the pleadings as closed at 10.10 a.m. of June 11th.

To hold otherwise would render nugatory the direction in Rule 1207 requiring service of notice of payment into Court. The reason of this is plain. The party taking out the order is entitled to a reasonable time to ascertain if this has really been done or not, and been done correctly, as well as to proceed with due diligence in the action. And for that purpose he should at least have one day. Otherwise, if the contention of the plaintiffs is correct, cases of unnecessary hardship might constantly be occurring. Suppose an action being carried on at Rat Portage, and defendant residing at L'Orignal or Cornwall, or even at some of the many considerable places that are not even county towns. Unless communicated by telegraph, notice of payment in would not be received for nearly a week after it



had been made. And, in the meantime, the pleadings would have been noted as closed. Then there would have to be a motion involving costs payable by the litigants. All this is saved by the construction that is now given to Rule 1207. And I think this must be the true construction, because it would prevent just what has occurred in this case. I have no doubt that this was its object, and the language seems to admit of no other construction. It would be idle to direct service of a notice unless it was to have some effect.

The motion must be allowed, and the plaintiffs must pay the costs of their experiment, in any event.

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## [IN THE COURT OF APPEAL.]

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April 14.

IN RE THE EQUITABLE SAVINGS LOAN AND BUILDING  
ASSOCIATION.

*Company—Winding-up—Final Order—Appealable Order—Order Dissolving Company—Order Rescinding—R.S.O. 1897, secs. 27-41—Consolidated Rule 358—Ontario Joint Stock Companies Winding-up Act.*

On March 24th, 1902, a county court Judge made an order, upon an affidavit of a liquidator, declaring the above association dissolved. On June 21st, 1902, on the application of a dissatisfied shareholder, he made an order revoking his former order, and also one which he had made on April 7th, 1902, staying proceedings in actions against the association.

*Held*, that the order of June 21st was an appealable order, for even if the appeal to the Court of Appeal under section 27 of the Winding-up Act was to be restricted to appeals from final orders, yet this was a final order since it put an end to the order of dissolution.

*Held*, however (MACLENNAN, J.A., *dissentiente*, on the ground that the county court Judge had been misled when making the order), that the county court Judge had no authority to make the order of June 21st, as he had no further material before him than he had had when making that of March 24th, and there was no reason for saying that he had been misled in making the former order, and the proper way to have attacked the latter order was by appeal.

THIS was an appeal by the liquidators of the above association, from an order of the junior Judge of the county of York, made on June 21st, 1902, whereby he rescinded an order previously made by him on March 24th, 1902, under sec. 41 of the Ontario Winding-up Act, R.S.O. 1897, ch. 222, declaring the association dissolved; and, also, another order made by him on April 7th, 1902, that no action or other proceeding should be commenced or proceeded with against the association, except by leave of the Court, upon the ground that the Judge had no jurisdiction to make the order appealed from.

The appeal was argued on November 24th, 1902, before OSLER, MACLENNAN, and GARROW, J.J.A.

A. B. Aylesworth, K.C., and A. M. Macdonell, for the liquidators, contended that the Winding-up Act did not contemplate an order reviving a company such as that in question here; that there was no power to make it, there being no suggestion of fraud; that at anyrate, such an order could be only dealt with by appeal: *In re Lyric Syndicate, Limited*

(1900), 17 Times L.R. 162; *McNabb v. Oppenheimer* (1885), 11 P.R. 214; that the effect of the order of March 24th, 1902, being made, and reported to the Provincial Secretary, was to dissolve the association: *Coxon v. Gerst*, [1891] 2 Ch. 73; *Larivée v. La Société Canadienne-Française de Construction de Montreal* (1890), M.L.R. 6 Q.B. 464; Buckley on Joint Stock Companies, 7th ed., p. 359; that the ground on which the county court Judge had proceeded was not a proper ground; that the statute provides protection for dissentient shareholders: R.S.O. 1897, ch. 222, sec. 13; *Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, at p. 460; *Postlethwaite v. Port Philip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452, at p. 466; *City and County Investment Co.* (1870), 13 Ch. D. 475, at p. 482; and that if shareholders can act as here, they can keep the liquidation open indefinitely, but it is important there should be some finality.

G. F. Shepley, K.C., and C. D. Scott, for the respondents, contended that the affairs of the association could not be said to be completely wound up till the assets of the concern are distributed among the shareholders, which was not the case here; that the order of March 24th, 1902, was made on an *ex parte* application, otherwise it might have been shewn that the facts required to give jurisdiction did not exist; that when the Judge found that the company had not been completely wound up, he rescinded his order, as he had power to do; that the affairs of a company could not be said to be fully wound up before the shareholders knew what they were to receive; that the proper course where an *ex parte* order is made, is to apply to rescind, not to appeal: *Hesketh v. Ward* (1867), 17 C.P. 667; that all the facts not having been disclosed to the county Judge when he made his former order, he had a right to rescind it: *Shaw v. Nickerson* (1850), 7 U.C.R. 544; that his order of June 21st, 1902, was not a final order, and therefore not appealable: *In re D. A. Jones Co.* (1892), 19 A.R. 63; *Partlo v. Todd* (1888), 17 S.C.R. 196. They referred also to *In re Imperial Bank of India, China and Japan* (1866), L.R. 1 Ch. 339.

Aylesworth, in reply, contended that there had been no inadvertence or surprise, or concealment here, nor any new fact disclosed on the motion to rescind; and that the English statute

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was materially different to our own: *Clinch v. Financial Corporation* (1868), L.R. 5 Eq. 450, 4 Ch. 117; *Re Financial Corporation*, [1866] W.N. 162; that the company here had been "wholly and completely wound up:" *In re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273; *In re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140.

April 14. OSLER, J.A.:—Proceedings were taken by the directors and shareholders of this company, under the Winding-up Act of Ontario, R.S.O. 1897, c. 222, by which it was placed in voluntary liquidation, with a view to its amalgamation with or the transfer of its assets to another company, called the Colonial Investment and Loan Company. An agreement, authorized by special resolution passed at a special general meeting of the company, was duly executed, and the terms of this agreement had been so far carried out by the transfer of the assets of the company, and arrangement for allotment to their shareholders of shares in the Colonial Company, as, in the opinion of the liquidators, to warrant an application to the Court, *i.e.*, the county court, for an order for the dissolution of the company under section 41 of the Act. Such an application was accordingly made to the junior Judge of the county court of the county of York, on March 24th, 1902, supported by the affidavit of one of the liquidators, in which all the proceedings which had been theretofore taken, including the agreement between the two companies, were set forth, and the learned Judge thereupon made an order "that the Equitable Savings Loan and Building Association be, and the same is, dissolved."

It is stated in the reasons of appeal, and was assumed or not denied on the argument, that this order had been reported by the liquidators to the Provincial Secretary, as required by section 41, though I do not find this fact stated in any of the affidavits filed before the Judge in the subsequent proceedings now in question.

On April 7th an order was made by the Judge, on the application of the liquidators, that no action or other proceeding should be proceeded with, or commenced against the Equitable Loan Association, except with leave of the Court, and subject to such terms as the Court might impose.



It appeared that on March 24th, 1902, an action had been commenced and a writ served upon the liquidators of the company by one Riviere, for the purpose of setting aside all the proceedings leading to a transfer of the assets of the Equitable, and to restrain the liquidators from carrying out the agreement and completing the transfer.

Whether this writ had been served before the application for the order of March 24th, does not appear. The action seems to have been afterwards settled.

On April 17th notice of motion was given on behalf of certain other dissatisfied shareholders, of an application to be made to the Judge to set aside and vacate his orders of March 24th and April 7th.

The application was made accordingly, and judgment reserved thereon until June 21st, 1902, when an order was made vacating and discharging the two orders in question. In his written judgment the learned Judge says that from the representations made to him, and the materials presented to him on the application for the order to dissolve the company, he was satisfied that there had been a full and complete winding-up of the affairs of the company, so as to warrant the issue of the orders, but that he is now satisfied that the orders were made prematurely, and ought to be set aside.

It does not appear that any statements or representations were made to the learned Judge, other than those set forth in the affidavit of the liquidator made on the application for the order to dissolve the company.

The liquidators now appeal from the order of June 21st, contending that the Judge of the county court had no jurisdiction to make it. Counsel for the dissatisfied shareholders support its validity, and attack the regularity and sufficiency of the order of March 24th and of the earlier proceedings. They also contend that the order of June 21st is not a final order, so as to be the subject of an appeal within the meaning of section 27 of the Winding-up Act, R.S.O. 1897, ch. 222.

I am of opinion that the order of June 21st is an appealable order. Section 27, sub-sec. 1, enacts that "any party who is dissatisfied with *any* order or decision of the Court in any

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proceeding under this Act, may appeal therefrom," and by subsec. (2) no such appeal shall be entertained unless the appellant has "within 8 days from the rendering of *such final* order or judgment," taken proceedings on the appeal, and given security that he will duly prosecute it. If an appeal is confined by this language to final orders, restricting the wide language of subsec. 1, we have no definition of what is essential to that quality. The final order is not contrasted, as in section 52 of the County Courts Act, with orders "merely interlocutory:" *McPherson v. Wilson* (1890), 13 P.R. 339; *Baby v. Ross* (1892), 14 P.R. 440.

In this case the learned Judge had made what appears to me to be a discretionary order, under section 41, dissolving the company. I am inclined to think that in a case of voluntary liquidation he is not bound to make an order under that section, but may leave the liquidators to proceed under section 40.

It may be that no appeal would lie from his refusal to make such an order, though it is unnecessary to decide, and I do not decide, this. He did, however, make it, and the result was, if he had authority to do so, that the company was dissolved. Thereafter he assumed to make the order now in question, rescinding and vacating his former order. If he had authority to make that order, the status of the company was restored, and it appears to me that such an order is properly described as a final order, since it undid and put an end to the order of dissolution which, upon the facts, the learned Judge seems to have thought he had no authority to make. Upon the same state of facts, or in the exercise of his discretion, he would not or might not make a similar order in the future, and on these grounds the order of June 21st may properly, I think, be regarded as a final order, and therefore appealable: *In re D. A. Jones Co.*, 19 A.R. 63; *In re The Essex Centre Manufacturing Co.* (1890), 19 A. R. 125; *In re Haggert Brothers Manufacturing Co.* (1893), 20 A.R. 597. See also *Jenking v. Jenking* (1884), 11 A.R. 92-95.

The next question, and, in my opinion, the only other question on the appeal, is whether the learned Judge had authority to make the order of June 21st, rescinding that of March 24th. It appears to me, upon full consideration, that he had not. The order of March 24th was an appealable order,

and any one of the shareholders might have appealed to this Court against it on any of the grounds on which it is now suggested that it is wrong. It is true that it was an *ex parte* order, and, under certain circumstances, a Judge who has made such an order may rescind it before it has been acted upon, as, for example, that it was obtained by fraud or misrepresentation, or by suppression of material facts. Many of the authorities are collected in the case of *McNabb v. Oppenheimer*, (1885) 11 P.R. 214, before the late Mr. Justice Rose. But in the case at bar, the facts and circumstances in which the learned county court Judge acted as furnishing reasons for rescinding his order, were all set forth in the affidavit of the liquidator in support of the application for it, and the papers and documents referred to therein as exhibits. There is no reason for saying that the learned Judge was misled, or that any fact was suppressed. He merely took a different view of the facts from that which he now thinks he ought to have taken. He thinks the order of March 24th was premature, and his reasons for so thinking are the facts disclosed in the affidavit which was then before him. This only shews that the proper way to have attacked that order was by appeal, not by an application to the Judge who made it to rescind it after it had been acted upon and become effective. I am, therefore, of opinion that the order of June 21st, in so far as it attempts to vacate and discharge the order of March 24th, is one which the Judge had no authority to make, and that the appeal therefrom should be allowed: *Jenking v. Jenking*, *supra*. As regards the order of April 7th, if there were any authority to make it at that time, it was in its nature one which remained subject to be controlled or avoided by the Court—an order staying proceedings until further order—and, therefore, *valeat quantum*, I see no objection to an order discharging or setting it aside.

Whether an action will lie at the instance of the respondent shareholders, notwithstanding the order of March 24th, it is not for us now to decide, though I may say that I am not strongly impressed with the merits of their contention. It may be that the existence of the condition on which the Judge is authorized to make it will be found of more importance than it has been said to be in the case of a dissolution

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under the section of the Imperial Act, 1862, which corresponds with section 40 of our Act: Buckley on Joint Stock Companies' Act, 7th ed., pp. 359, 360.

I think that the appeal should be allowed with costs.

GARROW, J.A., concurred.

MACLENNAN, J.A.:—I am of opinion that the appeal fails.

I have carefully read and considered the affidavits, and the exhibits therein referred to, which were before the learned county Judge when he made the order of March 24th, 1902, and I think they were calculated to mislead him, and to induce him to make an order which ought not to have been made.

The affidavits and exhibits shew that the winding-up was to be effected by a sale of the association's assets to the company, in consideration of shares of the company to be issued to the shareholders of the association. That is an arrangement authorized by section 13 of the Winding-up Act, R.S.O. 1897, ch. 222; and it seems not to make any difference that the shareholders of the selling company are of the '*monthly payment*,' or '*prepaid*,' or '*permanent*' class. Accordingly, the agreement provided that the company should issue shares to the shareholders of the association, according to the value of the respective holdings of the latter, with a special provision, in case of fractional allotments, for payment of a deficiency either in cash or by the application of future dividends.

The assets of the association were duly transferred and conveyed to the company; but when the order for dissolution was applied for, the shareholders of the association had not in fact received their allotments, although the amounts appear to have been ascertained. The proceedings appear to have been regular, so far as they went, but I think it could not be properly said that the affairs of the association had been completely wound up.

Now, Mr. Wardell's affidavit, after setting out the various proceedings which had been taken, concludes with this statement: "We have completely wound up the affairs of the said The Equitable Savings, Loan and Building Association, in accordance with the special resolutions hereinbefore referred

to." That affidavit is concurred in by Mr. Taylor.\* The application for the order was made *ex parte*, and the learned Judge says in his judgment now appealed against, that the materials before him set forth that "all the affairs of the Equitable Company had been duly wound up by the liquidators," and that "all things had been done by which the shareholders of the Equitable Company had been satisfied for their interest in the assets of the Equitable Company." He further says: "From the representations made to me on the application, and from the material presented to me, I was satisfied, on granting the orders, that there had been full and complete winding-up of the affairs of the Equitable Company so as to warrant the issue of these orders."

The fact being that the winding-up was not complete, inasmuch as the association's shareholders had not received their allotments, it is plain that the learned Judge made the orders under a clear misapprehension of the real state of affairs.

The order was made on March 24th, and the motion was made, with reasonable promptitude, on April 17th, to set it aside.

That it was an order which ought not to have been made is too clear to require demonstration, and if the learned Judge had power to set it aside, what he did was right.

It is said that he had no authority to do so, and that any party affected by it should have appealed.

It is not necessary to decide whether an appeal might have been brought, although that has been decided in the affirmative: *In re Allen* (1871), 31 U.C.R. 458. But I think it is clear that the learned Judge had the power to do what he did.

No rules of practice have been made, so far as we have been informed, under section 45, and there is no Insolvent Act in force in the Province, the rules under which would have been applicable under section 3 of section 45. It may be also that Con. Rule 358 cannot be held to be directly and expressly applicable, because Rule 1216, extending the Con. Rules to county courts, only in terms extends them to actions, while the present proceeding cannot be said to be an action nor to be

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\* Mr. Taylor was Mr. Wardell's co-liquidator. — REP.



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*included* in the word *action* by any of the interpretation rules. But Con. Rule 3 provides that, as to all matters not provided for in the rules, the practice, as far as may be, shall be regulated by analogy thereto. There being no express provision applicable in this case, the learned Judge was authorized and required to proceed by analogy to Rule 358, and to hear the motion which was made to him to set aside this *ex parte* order.

But even if there were no rule or analogy applicable to the case, I think the learned Judge would have been authorized by the well-established general practice of the Courts, independently of express rules. Such was the "course of the Court," as it was called, in Chancery: see 2 Daniell's Procedure, 5th ed., p. 1436; and the same was the practice at common law: see the cases collected by Harrison, C. J., in *Kidd v. O'Connor* (1878), 43 U.C.R. 193, 200.

In the present case, not only was the order granted by the learned Judge through misapprehension and in ignorance of material facts, but the order was wholly void. The authority for such an order is conferred by section 41 of the Act, which authorizes it to be made only "whenever the affairs of the company have been completely wound up." That was clearly not the state of the case, and the order was properly set aside.

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## [IN THE COURT OF APPEAL.]

REX V. JAMES.

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April 14.

*Criminal Law — Keeping Common Gaming Houses—“Gain”—Payment for Refreshments—Profit—Misdirection—Acquittal of Defendant—Crown Case Reserved—New Trial.*

The defendant was indicted for keeping a common gaming house, contrary to secs. 196 (a) and 198 of the Criminal Code. The former defines a common gaming house as a house, room, or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing “poker.” Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The “rake-off” did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night’s play:—

*Held*, that “gain” may be derived indirectly as well as directly; that by what the defendant allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players.

The direction of the Judge at the trial to the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved for the Crown, but the Court declined to order a new trial.

*Per OSLER, J.A.*:—A case should not be reserved at the instance of the prosecutor after an acquittal.

CASE stated by Morgan, junior Judge of the county court of York, before whom and a jury the defendant was tried at the general sessions of the peace, on the 6th December, 1901, upon an indictment charging that the defendant did, at the city of Toronto, on the 1st July, 1901, and on other days and times both before and after the said date, unlawfully keep a certain disorderly house, to wit, a common gaming house, at the premises known as No. 376 Queen street west, Toronto, contrary to the Criminal Code, secs. 196, 198. It was admitted by the Crown that the only evidence to support the indictment was under sec. 196 (a). The premises in question consisted of a cigar store, with two other rooms in the rear. Samuel James, the defendant, was in charge on the evening of the 1st July,

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1901, and had the management for the proprietor, when a number of police officers visited the premises. A game of "poker" was in progress. There was a "rake-off" to cover the expenses of cigars, liquids, and other refreshments consumed by the individuals playing the game. The Judge told the jury that if the "rake-off" was not more than reasonably enough to pay the proprietor for what he furnished in the way of cigars and refreshments the defendant would not be liable. The jury found the accused not guilty.

The question reserved for this Court was whether the Judge was, as a matter of law, right in his direction to the jury, or whether the profit made by the defendant out of the sale of cigars to the players who frequented the place for the purpose of playing at games of chance, under the circumstances set out, rendered the defendant liable as keeping the place "for gain."

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on the 26th January, 1903.

*J. R. Cartwright*, K.C., for the Crown. There was a profit to the proprietor, and that is "gain:" *In re Arthur Average Association for British, etc., Ships* (1875), L.R. 10 Ch. 542, 546.

*T. C. Robinette*, K.C., for the defendant. The jury having found the defendant not guilty, the question is an academic one. The Judge's charge was in accordance with *Regina v. Saunders* (1900), 3 Can. Crim. Cas. 495.

April 14. OSLER, J.A.:—The defendant was indicted for keeping a common gaming house contrary to secs. 196 (a) and 198 of the Code. The former defines a common gaming house as a house, room, or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing poker. Out of the stakes which were bet on most, though not all, of the different hands, a sum of five cents was withdrawn and put to one side as a "rake-off" to cover the expenses of the cigars and refreshments consumed by the

players. The frequenters left as late as 3, 4, or 5 o'clock in the morning.

The manager and proprietor only charged and received the fair price of the refreshments furnished to the frequenters, such as would be charged in an ordinary restaurant, and the cost of the cigars sold to them; 50 to 100 of these would be consumed in the course of an evening, the profit on which would be from 2 cents to 4 cents a piece. No charge was made for the use of the room.

One Repath, an informer who had given evidence in the police court, before the police magistrate, when the defendant was committed, was not present at the trial, being absent in the United States, and his evidence was read to the jury. It was, in effect, that he had repeatedly been at the defendant's place playing poker, 5 cents ante and 25 cents limit, with a rake-off of five cents on each hand, collected by or for the defendant; that this rake-off did not include refreshments, but that refreshments were served, and the amount received by the defendant would more than cover the cost of the refreshments; that he knew the defendant, and that he had taken about \$50 as a rake-off at one sitting of the game. This was denied by the defendant.

The Crown contended that the use of the room in question as an adjunct to the cigar shop was a colourable transaction, and that the profit made out of the sale of cigars alone was sufficient to constitute a keeping "for gain."

The defendant, on the other hand, urged that the indirect advantage derived from the sale of cigars was the only benefit derived from playing of the game, and that this was in the ordinary course of his business and was no infraction of the Act.

The learned junior Judge of the county court, before whom the case was tried with a jury, told them that if the rake-off was not more than reasonably sufficient to pay the proprietor for what he furnished in the way of cigars and refreshments, then, leaving to one side the evidence of Repath, the defendant would not be liable. But, if the amount of the rake-off was so disproportionate to the value of what was actually furnished in the way of cigars, and whatever was given in the way of

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refreshments, as to be an actual substantial profit to himself, he thought defendant had broken the law, and that the refreshment business was only a device to evade the statute. He thought that, apart from the testimony of Repath, the evidence would not sustain a conviction.

The jury found the defendant not guilty, and, at the request of the Crown, the Judge reserved the following question for the Court of Appeal: "Was I right in my direction as a matter of law, or did the profit made by the defendant out of the sale of cigars to the persons who frequented his place for the purpose of playing at games of chance, under the circumstances set forth, render him liable as keeping the place for gain?"

The place in question was a room or place kept by the defendant, and it was a place to which persons resorted for the purpose of playing games, or a game, of chance. Was it kept by him for "gain?" The Act does not define the word, or limit its meaning to gain derived from the rental of the room or a share of or interest in the stakes played for. In this respect the section is very different from sec. 1 of the 2nd part of the Betting Act, 1853, 16 & 17 Vict. ch. 119 (Imp.): *Regina v. Hobbs*, [1898] 2 Q.B. 647, 656.

"Gain" is "that which is acquired or comes as a benefit, profit, or advantage," and it may be derived indirectly as well as directly.

The defendant was not keeping the room or place heated and lighted until all hours of the night and morning for nothing or for some benevolent or charitable purpose. It was, or so the jury might have found, an adjunct to his usual business of a cigar dealer. By what he allowed to be done there, the profits of that business were increased more or less by the sale of the goods in which he dealt, and so he might be found to have kept it for gain, though the gain was confined to the profits on the cigars which he sold to the players. Such a place as the defendant kept is, in my opinion, one of the places the Act strikes at, and perhaps one of the most dangerous. The question of what is a keeping it for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments



which he furnishes to the players. The question for the jury is whether he keeps the place for gain, and they may be properly told that the increased profits of the business derived from the sale of the defendant's goods to the persons who resort to his room for the purpose of play, is some evidence of keeping it for gain.

For these reasons, I am of the opinion that the direction of the Judge was wrong, and that the proper direction to have given is that which I mentioned. As the matter is always one for the jury, the question set out in the reserved case cannot be answered in the precise terms in which it is framed.

I repeat my dissatisfaction with the practice of reserving cases at the instance of the prosecutor after an acquittal, and this case seems to me equally to illustrate its impropriety, as the defendant has been fully tried, and the jury might have convicted him upon Repath's testimony alone. It is a plain case for declining to direct a new trial, even if we have the power to do so.

MACLAREN, J.A.:—The defendant was tried at York county sessions, under secs. 196 and 198 of the Criminal Code, for keeping a common gaming house. It was shewn that persons resorted to a room of which he was the manager, though not the proprietor, in rear of a cigar store, for the purpose of playing poker, which they kept up during the evening, and sometimes until 4 and 5 o'clock in the morning. The players were chiefly, but not exclusively, customers of the cigar store. Out of the stakes there was taken from time to time the sum of five cents, called a "rake-off," which went to pay for refreshments supplied by the proprietor to the players, and which it was claimed was not more than a restaurant would have charged for them. No charge was made for the use of the room nor for the lighting or attendance. The only other profit to the proprietor was that from the sale of his cigars, from 50 to a 100 being sold of an evening. The chairman told the jury as a matter of law that if the "rake-off" was not more than reasonably enough to pay the proprietor for what he furnished them in the way of cigars and refreshments, then (leaving to one side the evidence of one Repath) the defendant

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would not be liable. He also told them that the proper test was whether he made "an actual substantial profit."

I am of the opinion that this construction of the statute is too narrow. There being evidence that the defendant was the keeper, under sec. 198, and that it was a room to which many persons resorted for the purpose of playing a game of chance, or a mixed game of chance and skill, the further question arose: For what purpose was the room kept? There is nothing in the evidence as stated in the reserved case to indicate that it was put to any other use. The room was furnished and lighted, and there was also attendance upon the customers or frequenters. There is no evidence or suggestion that the room was kept for any philanthropic or benevolent purpose. Indeed, while the forbidden object of "gain" was strenuously challenged on behalf of the defendant, no other object or purpose was even suggested. The test indicated of "an actual substantial profit" is not, in my opinion, the proper one. Many a business is carried on, not only without an actual substantial profit, but even at a loss which may eventually land the proprietor in bankruptcy, yet it is none the less carried on for gain. In my opinion, the whole question should have been submitted to the jury, without any such restriction or qualification as that indicated in the charge and reserved case, and I am of the opinion that, even apart from the testimony of Repath, there was ample evidence on which the jury, if they believed it, might have found the defendant guilty of the offence with which he was charged.

MOSS, C.J.O., MACLENNAN and GARROW, J.J.A., concurred.

E. B. B.

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## [IN THE COURT OF APPEAL.]

REX v. WOODS.

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April 14.

*Criminal Law—Bigamy—Defence—Dissolution of Former Marriage—Decree of Foreign Court—Validity—Domicile.*

Upon an indictment of the defendant for bigamy, the defence was, that she had been divorced from her husband by the decree of a foreign Court :—

*Held*, that the marriage being a Canadian one, and the domicile of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed.

*Magurn v. Magurn* (1883-5), 3 O.R. 570, 11 A.R. 178, and *LeMesurier v. LeMesurier*, [1895] A.C. 517, followed.

*Per OSLER, J.A.*:—The Court of Appeal should not be asked, by a reserved case, to solve questions on which the validity of a conviction does not necessarily depend.

CASE reserved by McDougall, Judge of the county court of York, before whom and a jury the defendant, Minnie G. Woods, was tried on the 2nd October, 1901, at the general sessions of the peace, upon an indictment for bigamy, and convicted. The questions reserved were as follows:—1. Is a decree of divorce granted to either party from a marriage contracted in Canada, pronounced by a competent court of the State of Michigan, for "extreme cruelty," a cause recognized as sufficient by the law of the said State, but a cause not recognized as a sufficient ground of divorce by the law of Canada, to be considered a valid decree of divorce in Canada? 2. In case the Court is of opinion that such a decree of divorce granted by a competent court in the State of Michigan for the said cause is to be considered as binding and valid in Canada, was the decree of divorce granted by the surrogate court of Wayne county, Michigan, under the circumstances in evidence—both as to the facts and law—a valid and effectual divorce between the parties, so as to constitute in law a good defence, under the Criminal Code, to the indictment?

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 26th January, 1903.

*T. C. Robinette*, K.C., for the defendant, contended that the questions should be answered in the affirmative, citing *Guest v.*

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*Guest* (1882), 3 O.R. 344; *Magurn v. Magurn* (1883), 3 O.R. 570, (1885), 11 A. R. 178; *Wadsworth v. McCord* (1886), 12 S. C. R. 466; Dicey, *Conflict of Laws*, pp. 79, 131, 157, Appx., notes III., IX.; *Scott v. Attorney-General* (1886), 11 P.D. 128; *Shaw v. Attorney-General* (1870), L. R. 2 P. & D. 156; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Mordaunt v. Mordaunt* (1870), L. R. 2 P. & D. 109; *Stevens v. Fisk* (1885), Cassels's S.C. Dig. 235; Gemmill on Divorce, pp. 25, 26, 64, 71, 184, 186.

*J. R. Cartwright*, K. C., for the Crown. The questions should be answered in the affirmative. The divorce proceedings were collusive; "extreme cruelty" is not a ground for a divorce; and the Michigan Court had no jurisdiction, the parties before it not having acquired a Michigan domicile: *LeMesurier v. LeMesurier*, [1895], A.C. 517, especially at p. 527, *per* Lord Watson.

April 14. Moss, C.J.O.:—The facts stated in the reserved case shew that, at the time of the marriage between William N. Barnhardt and the defendant, both had their domicile in Canada, and the marriage was celebrated in this Province.

Barnhardt had been a resident of the city of Toronto for a number of years before 1897. In the early part of that year he went to Detroit, for what purpose is not stated. He remained there apparently until the 5th July, 1897, the date of the marriage, when he came to Windsor and was married to the defendant, and remained in the Province until the following October. Up to this time there was nothing to evidence an intention to become domiciled in Michigan.

It is clear that there was no change of domicile in the interval between the marriage and the decree of divorce pronounced by the surrogate court of Wayne county, in the State of Michigan. There was nothing more than a temporary change of residence. The marriage with Barnhardt took place on the 5th July, 1897. They continued to reside together in Canada until some time in the following September, when he went to Detroit. The defendant remained in Toronto until some time in October, when she too went to Detroit, but they did not live together. Each seems to have been advised to take proceedings for divorce as soon as the residence in

Michigan was sufficient to enable them to be taken under the laws of the State. Each did take proceedings, and, after pleadings filed, the defendant's attorney withdrew her proceedings and allowed a decree of divorce to be pronounced on proof of the charges in Barnhardt's bill. Both then seem to have returned to reside in Toronto, as it appears from the case that the defendant in November, 1900, went through the ceremony of marriage with one John Pendrill at Toronto, Barnhardt being at that time alive and a resident of Toronto.

The inference from these facts is, that Barnhardt's permanent home was Toronto, and that he never changed or intended to change his domicile. The nature of his residence in Detroit, and his conduct generally, so far as shewn, are inconsistent with the existence of an intention to reside there permanently.

The Courts in England have surrendered the theory once held that no English marriage could be dissolved by a foreign divorce. (See *Lolley's case* and *McCarthy v. DeCaix*, in note to *Warrender v. Warrender* (1835), 2 Cl. & F. 488, at pp. 567, 568.) It is now admitted that, where the parties to such a marriage are *bonâ fide* domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce a divorce which will be held valid: Dicey, *Conflict of Laws*, p. 757.

But they are not bound by any principle of international law to recognize as effectual the decree of a foreign court divorcing spouses who at its date had their domicile in England.

In *LeMesurier v. LeMesurier*, [1895] A.C. 517, the Judicial Committee, after a full examination of the authorities, came to the conclusion that according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concurred without reservation in the views expressed by Lord Penzance in *Wilson v. Wilson* (1872), L.R. 2 P. & D. 435, 442, including the following, viz.: "It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man

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and a woman are held to be man and wife in one country, and strangers in another."

The rule thus laid down by the Judicial Committee had been recognized and acted upon by the learned Chancellor in *Magurn v. Magurn*, 3 O. R. 570, and his opinion was affirmed by this Court, 11 A.R. 178.

The foreign decree set up in this case is, therefore, not one to which credit can be given in this country as having the effect of dissolving the marriage between the defendant and William A. Barnhardt, and the defendant was rightly convicted.

That being so, and having regard to the manner and form in which the findings upon the evidence are stated and the questions are framed, we do not deem it necessary to answer the questions otherwise than as above.

OSLER, J.A.:—Both the defendant's marriages took place in Canada, the first at Windsor, Ontario, on the 5th July, 1897, to one William N. Barnhardt, the second at Toronto, on the 7th November, 1900, to one John Pendrill. At the time of the first marriage the domicile of the defendant and her husband was Canadian, and he had been a resident of this country for some years previous thereto. At the time of the second marriage, the defendant's first husband was still, to her knowledge, living.

As an answer to the indictment she set up a divorce obtained from Barnhardt by a decree of the surrogate court of the State of Michigan, on the 9th April, 1900, in an action for divorce there brought by him, the ground of divorce stated in the decree being the several acts of extreme cruelty on the part of the defendant charged in the bill of complaint.

It appeared that the defendant filed an answer to her husband's bill denying the alleged charges, and also filed a cross-bill in the same action, on her own account, for divorce from him for extreme cruelty on his part towards her. Barnhardt at first made default in answering defendant's cross-bill, which was taken *pro confesso* against him, with an order of reference to take proof of the facts, etc. By consent the order on default was set aside, and Barnhardt filed an answer to the cross-bill. Defendant's solicitor filed a replication to the



answer, and on the same day filed a statement that, "the costs having been paid, she would make no further contest to the husband's bill, and left him to take the decree without any contest." The decree, taken on the same day as the filing of the last mentioned document, set forth that the cause having been brought on to be heard upon the pleadings filed, and proofs of complaint having been taken in open court, and no testimony having been adduced on behalf of the defendant, on reading the pleadings and hearing the proofs taken as aforesaid, from which it satisfactorily appeared that the material facts charged in the bill of complaint were true, and that the defendant, Minnie G. Barnhardt, had been guilty of the several acts of extreme cruelty therein charged, it was thereby ordered and adjudged that the marriage between the complainant, William N. Barnhardt, and Minnie G. Barnhardt, be dissolved, and it was thereby dissolved accordingly.

In fact, no evidence was taken or proof given in support of the husband's charges, and on the trial of the indictment the defendant swore that they were untrue.

The onus was upon the defendant to prove a divorce valid and effectual to dissolve a Canadian marriage. Apart from the question whether the divorce was a collusive one, an essential ingredient of its validity, whatever the ground alleged for dissolving the marriage, was the jurisdiction of the Michigan Court, which depended upon the domicile of the parties or of the husband being in that State, where the proceedings were begun and the decree granted. That fact fell to be proved by the defendant in support of the decree, but there was no evidence that the Canadian domicile of both parties to the first marriage had ever been lost. The defendant failed, therefore, to prove a valid dissolution of that marriage, and the result is, that her second was bigamous and void.

I refer to *Harvey v. Farnie* (1882), 8 App. Cas. 43; *LeMesurier v. LeMesurier*, [1895] A.C. 517; *The Trial of Earl Russell*, [1901] A.C. 446, more fully reported in 18 Times L.R. 466; *Roberts v. Brennan*, [1902] P. 143.

According to the perfectly well understood principles of the law of domicile as administered in the English Courts and our own, including the High Court of the Parliament of the

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Dominion, the divorce relied on by the defendant was invalid on this ground. It was, therefore, needless to have submitted, and it is equally needless for us to examine, the first question set out in the case, which in effect is, whether, assuming that the Court of Michigan was competent *quoad* domicile, a Canadian marriage could be dissolved there for any cause saving *propter adulterium*.

A passage in the judgment of White, J., in a recent case of *Andrews v. Andrews* (1903), 23 Sup. Ct. Repr., pp. 237, 244, is pertinent: "The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicile. The proposition relied on, if maintained, would involve this contradiction in terms: That marriage may not be dissolved by consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicile and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicile to give effect to such judgment despite the prohibitions of the law of the domicile and the rule of public policy by which it is enforced."

As regards the question of collusion, which was a question of fact, we do not know whether it was left to the jury or not. For anything we know, this may have been the ground on which they found against the defendant, as the evidence of collusion was abundant: *Magurn v. Magurn*, 11 A.R. 178. Nothing was proved except a decree taken by consent of parties, without proof of any of the grounds which had been charged in the pleadings, and relied upon as grounds for the dissolution of their marriage.

I must add that I do not understand why this case should have been reserved. It was not intended that the Court should be asked to solve questions on which the validity of a conviction does not necessarily depend.

I think the conviction should be sustained.

MACLAREN, J. A.:—Minnie G. Woods was found guilty of bigamy by a jury at the general sessions of the county of York on the 2nd October, 1901. The late learned chairman, who

presided, reserved for this Court the question of law as to the validity of a decree of divorce granted by the surrogate court of Wayne county, Michigan, set up by her as a defence.

The accused lived for many years in Toronto, first with her husband Woods, and afterwards as his widow. William N. Barnhardt also resided in Toronto during these years, and was acquainted with her, both being legally domiciled there, so far as appears. In the early part of 1897 Barnhardt went to Detroit, for what purpose is not stated. On the 5th July, 1897, he and Mrs. Woods were married in Windsor, Ontario. From there they went to Preston, Ontario, where they remained about five weeks. They then returned to Toronto, living first in a boarding house, and subsequently in a house rented by the wife. About the 15th September, 1897, they quarrelled, and Barnhardt went to Detroit. In October the wife also went there, and instructed an attorney to take proceedings for divorce against her husband for cruelty and abuse. It is stated that by the law of Michigan one year's residence in that State is necessary to obtain a divorce if the causes arose within the State, and two years if they arose elsewhere. Before the two years were up, her attorney learned that Barnhardt had, on the 3rd October, 1899, filed a bill for divorce against her for "extreme cruelty," giving particulars. He also filed an affidavit of cohabitation with her up to the 15th September, 1897, and that he had resided in Michigan for over a year. The wife filed an answer and a cross-bill for "extreme cruelty." This was not answered by him, and an order *pro confesso* was taken out. Further proceedings followed, and finally on the 9th April, 1900, her attorney abandoned the cross-bill and filed a memorandum of settlement, stating that his fees were paid, and that he would allow Barnhardt to take his decree without any further contest. Thereupon a decree was made declaring the marriage dissolved, and both parties free from its obligations. On the 7th November, 1900, the accused was married at Toronto to one John Pendrill. At the trial here she swore that Barnhardt's charges against her were absolutely untrue, and that the cross-charge was true. The chairman of the sessions directed the jury, as a matter of law, that, upon the facts set out in the case, the

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Detroit divorce was invalid, but, at the request of counsel for the defence, reserved two questions for this Court.

I am of the opinion that the direction of the learned chairman was right. The case is very similar to one decided in this court in 1885, in which a Missouri divorce was held to be invalid: *Magurn v. Magurn*, 11 A.R. 178. Since then the whole question has been exhaustively reviewed and authoritatively decided by the Privy Council in a case of *LeMesurier v. LeMesurier*, [1895] A.C. 517. It is there laid down that, according to the rules of international law, the domicile of the married pair affords the only true test of jurisdiction to dissolve their marriage, and that a divorce will be recognized only when it has been pronounced by a court within whose forum the parties have their domicile. This is declared to mean the domicile of succession or true domicile. Mere residence will not suffice; nor will what has been called by some courts a matrimonial domicile be considered sufficient. In the present case it appears from the evidence that Barnhardt and the accused were both originally domiciled in Toronto, and there is no evidence of any change of domicile. Barnhardt was not called as a witness at the trial in Toronto, and there was no evidence of his intention to change his Toronto domicile for one in Michigan. According to the testimony of the Michigan attorney at the sessions, no evidence as to domicile is required by the law of that State. A residence of two years, or of one year, as the case may be, is all that is required to give their courts jurisdiction.

The Detroit divorce was, therefore, in my opinion, fundamentally bad, according to the rules of international law, as laid down by our highest Court, for want of a domicile in that State, which would be necessary to give a jurisdiction that would be recognized by our Courts.

Having arrived at this conclusion, it becomes unnecessary to consider the further point, whether the fact that the Michigan divorce was granted for alleged "extreme cruelty" alone, a cause not recognized by our law as sufficient, would prevent its being accepted as a valid divorce here.

In my opinion, the conviction should stand.

MACLENNAN and GARROW, JJ.A., concurred.

E. B. B.



[IN CHAMBERS.]

## JOHNSTON V. LONDON AND PARIS EXCHANGE.

1903

June 6.

*Evidence—Discovery—Production—Action for Penalties.*

It is improper in an action to recover penalties under the Extra-Provincial Corporations Act, 63 Vict. ch. 24 (O.), to issue the usual præcipe order for production of documents by the defendants.

Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside.

A MOTION by the defendants to set aside an order for production of documents was argued before Mr. Cartwright, Master in Chambers, on the 5th of June, 1903.

*George Bell*, for the plaintiff.

*R. B. Beaumont*, for the defendants.

JUNE 6. THE MASTER IN CHAMBERS:—This is an action to recover penalties under section 17 of 63 Vict. ch. 24 (O.). The plaintiff has taken out and served the usual order for production on oath of documents.

Mr. R. B. Beaumont, for the defendants, moved to set it aside as being futile and useless, and therefore unnecessary.

Mr. George Bell, for the plaintiff, contended that the order should not be set aside, but that the defendants should be left to claim privilege if so advised.

There are no cases that are exactly in point, but *Malcolm v. Race* (1894), 16 P.R. 330, does not seem to be distinguishable in principle. That was an action to recover penalties under the Ontario Elections Act, 1892. The plaintiff took out an order for examination of the defendant for discovery. The defendant attended, but declined to be examined. On being ordered by the local Judge to attend, on penalty of having his defence struck out, the defendant appealed. After consideration the appeal was allowed by Sir W. R. Meredith, C.J. He said, referring to the English cases shewing that the plaintiff in such actions is not entitled to examination for discovery: "These are express decisions upon the point, and I ought to follow them; and although under our practice no order is necessary



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for the examination of a party for discovery, it is better to stop such an examination *in limine* than to allow it to proceed subject to objection." This judgment was cited with approval by both the Chief Justice of the King's Bench and Mr. Justice Street in giving the judgment of the Divisional Court in the case of *Hopkins vS. mith* (1901), 1 O. L. R. 659, at pp. 661-2. In that case a motion was made similar to the one under consideration.

I therefore make the order that was made by the Chancellor in *Hopkins v. Smith*, setting aside the order with costs to the defendants in any event; being the order affirmed and approved of by the judgment of the Divisional Court, above cited.

R. S. C.

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[OSLER, J.A.]

## CLERGUE v. MCKAY.

1903

July 15.

*Vendor and Purchaser—Offer to Sell—Purchaser Pendente Lite—Certificate of Lis Pendens—Registration—Specific Performance—Delay—Damages.*

A letter by the vendor's agent to a probable purchaser giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and upon the person so written to stating that he will buy at the price named a contract of sale and purchase is constituted between the parties.

After the contract for sale had been entered into the vendor sold and conveyed the land in question, which was of a speculative character, to a third person, who purchased in good faith and without notice of the prior contract. Before he registered his deed the original purchaser began this action for specific performance and registered a certificate of *lis pendens*, but, although he knew of the second sale, he did not take any step in the action, or make the second purchaser a party, for nearly twelve months:—

*Held*, (1) following *Sanderson v. Burdett* (1869), 16 Gr. 119, that the second purchaser's rights were not affected by the registration of the certificate, and (2) that in any event the delay would have been fatal to the claim for specific performance as against him.

The vendor having deliberately broken his contract because of a better offer substantial damages were assessed against him.

ACTION for specific performance tried before OSLER, J.A., at Sault Ste. Marie and Toronto.

*J. M. Clark*, K.C., and *N. Simpson*, for the plaintiff.

*G. H. Watson*, K.C., and *W. H. Hearst*, for the defendants.

July 15. OSLER, J.A.:—Action for specific performance of an agreement to sell the defendant Preston's undivided two-thirds interest in certain property in the town of Sault Ste. Marie for the sum of \$1,200.

The case came on to be tried before me at the non-jury sittings at Sault Ste. Marie in November, 1902. The only persons then parties defendant were Mrs. Annie McKay and Thaddeus D. Preston. The action was dismissed as against the former; and in the course of the trial it appeared that after the making of the contract sought to be enforced, and before action, the defendant Preston had conveyed his interest to one W. B. Heath. The plaintiff relied upon the registration of a

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certificate of *lis pendens* two or three days before the registration of Heath's deed, and the case stood over for judgment on the evidence adduced by the parties.

Considering the business and official relations which appeared to exist between Heath and the defendant Preston, I thought it right to give the plaintiff an opportunity to amend if he should be so advised, by adding Heath as a party, and making the necessary changes in the pleadings. This was accordingly done, and the trial was resumed at Toronto on the 10th of July, 1903, on the amended record, in the presence of counsel for the plaintiff and the defendants Preston and Heath. It was agreed that the evidence taken at Sault Ste. Marie should be read against the latter defendant, saving all just exceptions.

The title of the defendant Preston to the property at the date of the alleged agreement was not in dispute, and both defendants were then, and still are, residents of the city of Iona, in the State of Michigan.

The plaintiff proved (1) an instrument dated the 1st of November, 1899, signed by the defendant, authorizing Mr. John McKay, of Sault Ste. Marie, to sell and dispose of his undivided two-thirds interest in the land for \$750, or such greater price and on such terms as he might think proper, and to execute such agreements for sale as might be requisite; (2) a formal power of attorney under seal dated the 21st of November, 1899, from the defendant to McKay, authorizing the latter to sell the land at such price and on such terms as he might think proper, and to execute such deeds and conveyances thereof as might be necessary. The defendant's wife was a party, and authorized McKay to bar and release her dower in the land to the purchaser.

Soon after becoming possessed of these powers, interviews and discussions took place between McKay and one W. H. Plummer as to the sale of the lots. According to the evidence of the latter, McKay asked him if he could make a sale. Plummer said he thought he could make one for \$1,200, but wanted to know whether there was any commission in it for him. McKay said there might be \$50, which would come out of the purchase money; and McKay, who was a member of the

firm of Hearst & McKay, the defendant's solicitors, then wrote and handed to him the following letter :—

“Sault Ste. Marie, Ont.,  
December 13th, 1899.

W. H. Plummer, Esq.,  
Town.

Dear Sir,

A client of ours who owns an undivided two-thirds interest in water lots 21 and 22 South Bay Street, is willing to sell such interest for \$1,200 cash, which is slightly above the rate of \$8 per foot frontage. Kindly advise us if you wish to purchase at that price.

Yours truly,

Hearst & McKay.”

Plummer was not at this time agent for any one to purchase, but he took the letter to a Mr. Rowland, the plaintiff's general solicitor and man of business, to be submitted to the plaintiff to see if he would take up the offer.

The business did not take fire very quickly, and about the 23rd of December McKay asked Plummer if there was any chance of making a sale “to him or his associates.” Plummer thought the parties were not disposed to buy, and McKay on that day advised his principal that there seemed no immediate prospect of a sale. On the 31st of December, however, Clergue told Rowland to authorize Plummer to accept the offer, and Plummer accordingly did so within the next two or three days, verbally, and as it would seem, in his own name, or at all events, without disclosing that the plaintiff was the purchaser.

It was, however, understood between McKay and Plummer and Rowland, with the latter of whom McKay got into communication immediately after the acceptance of the offer, that the deed was to be made to Plummer, and McKay was evidently satisfied to accept him as the purchaser, whether he was acting in the interest of other persons or not.

Several interviews took place between McKay and Rowland as to carrying out the sale, in one of which McKay told him he would prepare the deed and send it forward for execution.

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On the 12th of January, 1900, McKay accordingly did so, together with the following letter written by him in the name of his firm :—

“ T. B. Preston, Esq.,

Iona, Mich.

Dear Sir,

We have arranged to sell the two-thirds interest in the water lots to W. H. Plummer for \$1,200. This we consider is an extra good sale. We will of course have to allow him \$50 on account of commission. And in addition to this \$50, we will have to charge you our commission of \$60 on the sale. Kindly have deed executed and returned to us at once, and oblige,

Yours truly,

Hearst & McKay.”

Shortly afterwards the defendant wrote to McKay refusing to carry out the agreement, saying that he was advised it was better not to sell at the present time or at the price offered.

By deed bearing date the 18th of May, and executed on that, or the following day, the defendant Preston, without further communication with McKay, conveyed his interest in the property to the defendant Heath for the expressed consideration of \$3,000, of which the sum of \$900 was paid on the 19th of May, and a promissory note given for the balance, which was paid in full, \$1,200 in cash and \$900 by transfer of an interest in mining lands, by the 15th of May, 1901. The affidavit of execution of this deed purports to be sworn on the 29th of May, 1900, on which day and in ignorance of its execution, the writ in this action was issued and a certificate of *lis pendens* registered at three o'clock p.m. The deed to Heath was registered on the 1st of June at three p.m., but nearly twelve months elapsed before the writ and statement of claim were served on the defendant Preston and the action proceeded with. The plaintiff had long before this become aware of the conveyance to Heath, but the action was brought down to trial in November, 1902, without his having been made a party.

For the defendants it was contended that if the letter of the 13th of December, 1899, was an offer to sell, which they denied, it was an offer to sell to Plummer and not to the plaintiff, inasmuch as Plummer was not then the plaintiff's



agent; that if it was an offer, it was not followed up by a binding acceptance within a reasonable time; that any bargain made with Plummer after he had become the plaintiff's agent, was verbal only, and that the agent's letter of the 12th of January, 1900, was not evidence of a binding contract; that Plummer was not a purchaser, but was only an agent of the owner to sell, as evidenced by the promise to pay him a commission; that the defendant Heath being a *bond fide* purchaser and having obtained a conveyance before the commencement of the action, specific performance could not be enforced against him; and, lastly, that the delay in carrying on the proceedings against the defendant Preston and in commencing them against the defendant Heath, was in any case such as to disentitle the plaintiff to relief.

The plaintiff contended that there was a valid contract, evidenced in writing by the letter of the defendant Preston's agent; that registration of the certificate of *lis pendens* before the registration of the deed to the defendant Heath was sufficient to defeat any claim to the latter under that deed; that there had been no such delay as to affect his rights; and that Heath was not in fact a *bond fide* purchaser without notice.

I am, in the first place, of opinion that the letter of the 13th of December is in terms an offer to sell, on the acceptance of which by Plummer a valid contract of sale would have been constituted between the parties, that is between Plummer and the plaintiff. It is more than a mere statement that the writer is willing to receive an offer to purchase, out of which a contract would arise only on the acceptance by him of such offer.

In *Harvey v. Facey*, [1893] A.C. 552, the intending purchaser telegraphed the owner asking two questions: (1) whether he was willing to sell; and (2) what was his lowest cash price. The owner answered the latter question only, and it was held that this was not an offer to sell on which a contract would arise upon the intending purchaser saying "I will give that price."

So in *Johnston v. Rogers* (1899), 30 O.R. 150, there was nothing more than the quotation of a price and a request for an offer.

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Here the defendant says (in effect), "I am willing to sell at such a price; will you, W. H. Plummer, buy?" And the person to whom the letter is addressed says, "I will." If the requisites of the statute are complied with, there is a valid contract. Then, is there such a contract between the plaintiff and the defendant Preston? I think there is. McKay was the latter's agent to sell, armed with very comprehensive powers. Plummer may not have been the plaintiff's agent to buy when he received the offer from McKay, but on the evidence I find that the latter's belief or expectation (so far as that may be material) was that either he would find some person other than himself who would buy, or that he, or he and others to be associated with him, would do so, at the price named, less a commission or deduction of a specified sum. McKay was quite willing that Plummer should become the purchaser, even though he stipulated for this allowance, and the case would be distinguishable on this ground from *Livingston v. Ross*, [1901] A.C. 327, if Plummer were himself the plaintiff seeking specific performance.

All this, however, is of little consequence, because when Plummer on the 1st or 2nd of January, 1900, accepted the offer verbally, it was treated by McKay as an existing offer, and Plummer was then undoubtedly Clergue's agent to accept it, though he did so in his own name. It may be held, too, upon the evidence, leaving the written offer as such out of consideration, that there was then a verbal offer and acceptance on the same terms as those mentioned in the writing. And the letter of the 12th of January, 1900, is a note of it in writing amply sufficient to satisfy the statute, shewing as it does the land, the price, and the name of the purchaser—whether stated in terms to be agent of the plaintiff or not, is immaterial, because he was so in fact—and it is signed by the agent of the owner, whose authority was still in full force and effect. Such cases as *Munday v. Asprey* (1880), 13 Ch. D. 855; *Smith v. Webster* (1876), 3 Ch. D. 49, and *McClung v. McCracken* (1883), 3 O.R. 596, do not apply, as it is not sought to make out the contract from the terms of the deed which was sent to the defendant for execution. And the letter, though in the name of the agent's firm, was signed by him and states the terms of the bargain he

had made—a bargain which indeed, had he been so minded, he might have himself completed by the execution and delivery of a conveyance.

The next question is whether the plaintiff is entitled to specific performance of this contract as against the defendant Heath, and this depends upon whether the latter was a *bonâ fide* purchaser without notice of the contract, and the effect to be attributed to the registration of the certificate of *lis pendens* prior to the registration of the conveyance.

The plaintiff contends that the conveyance was not *bonâ fide*, and in any event that the registration of the certificate of *lis pendens* was of as high an effect as the prior registration of his own contract or a deed to himself would have been.

On both points I am against him. Upon the evidence I have no hesitation in finding as a fact that Heath was a *bonâ fide* purchaser without notice of the plaintiff's contract for the full consideration expressed in his deed. The deed was executed and (though this seems not material: R.S.O. 1897, ch. 119, sec. 36) a considerable part of the purchase money was paid at least ten days before the action was brought. Heath's title as purchaser *ante litem* was then complete, and although he had not registered his deed, he is not affected by section 97 of the Judicature Act, which provides that the instituting of an action . . . in which any title or interest in land is brought in question, shall not be deemed notice of the action . . . to any person not being a party thereto, until a certificate in the form prescribed, signed by the proper officer of the court, has been registered in the registry office of the registry division in which the land is situate. The object of this provision is to limit or control the application of the former doctrine as to the effect of a *lis pendens*, which, as stated in *Bellamy v. Sabine* (1857), 1 DeG. & J. 566, cited in *Price v. Price* (1887), 35 Ch. D. 297, broadly was that *pendente lite* no one could alienate the property in dispute so as to affect his opponent, the foundation on which the doctrine rested being "the impossibility of bringing an action or suit to a successful termination if alienation *pendente lite* was permitted to prevail." The mere existence of the action is no longer

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notice of the *lis pendens*. That is to be given by the registration of the prescribed certificate, but the object and effect of the notice so given are the same as before, namely, to prevent alienation *pendente lite*.

Heath was a purchaser *ante litem*, and as such was clearly a necessary party to the action. If he had been a party, he would have had all the notice that the registration of a certificate of *lis pendens* could have given him, but no one could have successfully contended that he was not still entitled to register his deed, or that if he omitted to do so, his defence of purchase for value without notice would have been affected thereby. This was the view of Mowat, V.-C., in *Sanderson v. Burdett* (1869), 16 Gr. 119, 127, and there is nothing in *Miller v. Smith* (1872), 23 C.P. 47, or any other cases to which I have been referred, which conflicts with it. These are cases of the registration of void conveyances, and for the reasons I have stated, I do not think they apply here.

Even, however, if I had taken a different view of the effect of the registration of the certificate of *lis pendens*, I should have been of opinion that the great and unexplained delay in proceeding with the action against Heath would have disentitled the plaintiff to relief. He was aware of Heath's deed for some time, I do not know how long, before the 23rd of May, 1901, when the writ and statement of claim against the defendant Preston were served or filed, nearly a year after the registration of the certificate of *lis pendens*. Before this the defendant Heath had paid the whole of his purchase money without notice in fact, but the case was brought to trial in his absence, and no proceeding was taken against him until the 31st of March, 1903, when he was made a party and the pleadings amended, as I have already mentioned.

The property was of a speculative nature, the registration of the certificate of *lis pendens* prevented its further alienation, and the plaintiff was doubly bound to prosecute the action with diligence and bring it to a speedy result: *Smith v. Hughes* (1903), 5 O.L.R. 238, 244, and cases there referred to; Fry on Specific Performance, 4th ed., pp. 475, 478; *Finnegan v.*



*Keenan* (1878), 7 P.R. 385; *Somerville v. Kerr* (1867), 2 Ch. Ch. 154.

As against the defendant Heath, therefore, I dismiss the action with costs. These costs are to be paid to him by his co-defendant Preston whose conduct has occasioned all the litigation: *Sanderson v. Burdett*, 16 Gr. 119-128; *Sanderson v. Blyth Theatre Co.* (1903), 19 Times L.R. 660.

As against Preston, there cannot of course be specific performance, but the plaintiff contends that damages ought to be awarded to him for the loss of his bargain. The case is not one in which the principles affirmed in *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, apply, where the vendor, without fraud or default on his part, or through mistake, finds himself unable to carry out his contract. The defendant knew, as appears by his letter of the 20th of January, 1901, that a contract had been closed by his agent McKay with Plummer, but in consequence of the report of one Taylor as to the value of the land, bearing the same date as McKay's letter announcing the contract, he seems to have determined to disregard it and to hold for a higher price, which he obtained by the subsequent dealing with the defendant Heath. He has in bad faith and for his own advantage broken his covenant, and prevented himself from carrying it out.

The case of *Day v. Singleton*, [1899] 2 Ch. 320 is authority that under such circumstances he may be ordered to pay damages for the breach. In assessing them as I do at the sum of \$500, I am awarding a much smaller amount than the evidence would warrant me in giving. It is not necessary to prolong the action by sending the case to a referee to assess the damages, and I therefore direct judgment for the plaintiff with costs for the above amount against the defendant Preston

See also *Jones v. Gardiner*, [1902] 1 Ch. 191; Ontario Judicature Act, sec. 57, sub-sec. 13.

Such amendment, if any, in the pleading as this judgment calls for, the plaintiff is to be at liberty to make.

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## [DIVISIONAL COURT.]

D. C.

1903

June 10.

HARVEY ET AL. V. MCPHERSON ET AL.

*Division Courts—Jurisdiction—Dividing Cause of Action—Division Courts Act, sec. 79—Promissory Note—Including in Larger Claim—Proof against Insolvent Estate.*

The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, made by defendants, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim :—

*Held*, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a division court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of sec. 79 of the Division Courts Act, R.S.O. 1897, ch. 60, forbidding the dividing of a cause of action.

APPEAL by the plaintiffs from the judgment of the junior Judge of the county court of Wentworth dismissing an action brought in the 1st division court in the county of Wentworth, on the ground that it was brought for only a part of the plaintiffs' claim, and there was thus a division of a cause of action, contrary to sec. 79 of the Division Courts Act, R.S.O. 1897, ch. 60.

The defendants purchased goods from the plaintiffs from time to time in continuous account, for some of which they gave to the plaintiffs promissory notes, the balance being charged in open account.

The defendants made an assignment for the benefit of their creditors, and the plaintiffs filed with the assignee an affidavit of claim, in which they stated their claims to be \$2,544.41 "for merchandise." They received from the assignee 25 cents on the dollar, and applied it generally on the whole claim.

The plaintiffs then instituted four actions against the defendants, one in the High Court for part of the same claim, and three in the 1st division court on three individual promissory notes, not included in the claim made in the High Court action.

One of the division court actions was discontinued. In the remaining two (of which this was one) the plaintiffs gave

no credit for the dividend which they had received, but, after the evidence had been taken, they admitted that they should have done so.

The junior Judge was of opinion that the plaintiffs had elected in the proof filed with the assignee to consider their claim a consolidated one for merchandise, and could have included their whole claim in one count.

The appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MACMAHON, JJ., on the 9th June, 1903.

A. McLean Macdonell, for the plaintiffs, cited *Franklin v. Owen* (1895), 15 C.L.T. Occ. N. 105, 158, 185; *Gilbert v. Gilbert* (1868), 4 U.C.L.J.N.S. 229, and cases there cited; *Re Clark v. Barber* (1894), 26 O.R. 47; *Re McDonald v. Dowdall* (1897), 28 O.R. 212; *Re Real Estate Loan Co. v. Guardhouse* (1898), 29 O.R. 602; *Nottawasaga Public School Trustees v. Township of Nottawasaga* (1888), 15 A.R. 310, 319.

C. A. Moss, for the defendants, relied on *Re McDonald v. Dowdall*, 28 O.R. 212.

June 10. The judgment of the Court was delivered by BOYD, C.:—The promissory note sued on, of date 15th November, 1896, was when due a single cause of action, and it still remains so, and may be sued as such in the division court.

What is relied on to shew that it is but a fraction of a cause of action is, that the debtors, becoming insolvent, made an assignment for creditors, and that the holders proved their claim upon this and other notes, and in respect of goods and merchandise for which they did not hold notes, before the assignee, for the lump sum of \$2,544.41, upon which was paid a dividend of 25 per cent. The holders had no security for their claim—the notes of the insolvents were not such security—and the notes could only be used as vouchers.

This massing of the whole indebtedness for the purpose of proving in insolvency did not merge the whole into such unity that it became an unseverable claim. As against the debtors there was no change in liability upon the several notes as separate causes of action, and all that happened on account of the insolvency was that 25 per cent. was paid and is to be credited on each note.

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The notes were not given up or abandoned, as argued: they remained the property of the plaintiffs, diminished by part payment, and in no other way affected. The transaction with the assignee was not one with the debtors which they can claim as extinguishing the notes and leaving only a remedy (on the footing of goods sold and delivered) for the whole merchandise.

The remedy on the particular note might have been barred by the Statute of Limitations, and to save that right this action was well brought in the division court: *Dickenson v. Harrison* (1817), 4 Price 282, 287; *Attwood v. Taylor* (1840), 1 M. & G 307. See also *Brunskill v. Powell* (1850), 19 L.J.N.S. Ex. 362 *Franklin v. Owen*, 15 C.L.T. Occ. N. 158, 185; *Richards v. Marten* (1874), 23 W.R. 93. *Brunskill v. Powell* shews that if there are distinct causes of action (*e.g.*, as on two promissory notes) they will not be turned into one cause of action if brought into one account, or entered into one book, and, by parity of reason, if continued in a transaction with a third party.

The judgment should be reversed and entered for the plaintiffs, with costs and costs of appeal.

T. T. R.

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## [DIVISIONAL COURT.]

## AHRENS ET AL. V. TANNERS' ASSOCIATION.

D. C.

1903

June 11.

*Discovery — Examination of Officer of Company — Agent of Unincorporated Association.*

The plaintiffs sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as the Tanners' Association :"—

*Held*, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending.

AN appeal by the defendants the Breithaupt Leather Company from an order of Meredith, C.J.C.P., in Chambers (1st June, 1903) affirming an order of the Master in Chambers (27th May, 1903) allowing the plaintiffs to examine Mr. D. A. Burns for discovery as an officer of the defendants.

Some years before action fourteen of the principal tanners doing business in Canada constituted themselves a body called the Tanners' Association. Their object was to offer such inducements to purchasers of sole leather as would lead them to purchase exclusively from the members of the association. The plaintiffs made all their purchases of sole leather from the Breithaupt Leather Company, an incorporated company. The plaintiffs on the 26th February, 1903, began this action against "The Tanners' Association." The writ of summons was addressed to all the members of the association, and was served on Mr. D. A. Burns "as a person having the control or management of the partnership business carried on by the Tanners' Association." To this writ the Breithaupt Leather Company alone appeared, stating that they were "sued as the Tanners' Association." The plaintiffs served their statement of claim upon the solicitors who had entered the appearance, and a statement of defence was filed for the Breithaupt Leather Company, alleging, *inter alia*, that Mr. D. A. Burns was authorized to act for them in reference to the matters in dispute, and that the plaintiffs were bound to furnish Mr. Burns with satisfactory evidence of any claim, but had not done so.



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The cause being at issue, the plaintiffs proposed to examine Mr. Burns for discovery, and the Master in Chambers, upon an opposed application, made an order directing him to attend, which was affirmed on appeal by Meredith, C.J.

The defendants appealed, and their appeal was heard by a Divisional Court composed of BOYD, C., FERGUSON and MAC-MAHON, JJ., on the 9th June, 1903.

*W. N. Tilley*, for the defendants.

*C. A. Moss*, for the plaintiffs.

*Morrison v. Grand Trunk R. W. Co.* (1902), 5 O.L.R. 38, and *Schmidt v. Town of Berlin* (1894), 16 P.R. 242, were referred to.

June 11. The judgment of the Court was delivered by BOYD, C.:—The statement of claim (paragraph 5) asserts that Mr. Burns was appointed "executive officer" of the association sued as the Tanners' Association. But according to the circular and the fact he is only an agent. It appears that this association is a partnership or unincorporated company consisting of a number of dealers in leather—in effect a syndicate made up of mixed partnerships and incorporated trading concerns, one of whom, the Breithaupt Leather Company (Limited) defends because "sued as the Tanners' Association." This company takes up the defence as being one of the constituents of the association defendant. This company can have officers within the meaning of the Rule as to discovery, but such officers the defendants cannot have as being a mere partnership. It does not follow from this method of defence that Burns, the agent of the association, becomes an officer of the Breithaupt Company, or is to be so regarded for the purposes of preliminary discovery. There is nothing to shew or to prove that he is an officer of the defendants or of the Breithaupt Company, who defend as for the Tanners' Association. If the whole body of the syndicate came in *seriatim* as defendants, like the Breithaupt Company, it would not make Burns an officer of each of them that happened to be incorporated so as to be examinable for discovery, and he certainly would not be such an officer as to any of the syndicate who are mere partnerships.



In brief, the whole syndicate aggregated become the defendants, a mere association, which has an agent, Burns—but this Burns is not an officer of each member of the syndicate who is a corporate body.

The case seems to be unique, and the policy of the Court is not to liberalize the construction to be put upon the Rule: *Morrison v. Grand Trunk R. W. Co.*, 5 O.L.R. 38: and, in my opinion, the order should be vacated. Costs in the cause to the defendants.

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## [DIVISIONAL COURT.]

D. C.

1903

June 5.

## GILLETT V. LUMSDEN BROTHERS.

*Trade Mark—"Cream Yeast"—Infringement—Trade Name—Acquisition of Right by User.*

The plaintiff in 1877 obtained the registration of a trade mark for a certain kind of yeast which he manufactured and sold, and in 1894 obtained another registration of the same. It consisted of a label bearing the representation of the head and bust of a woman with the words "Dry" and "Hop" on either side and the words "Cream Yeast" below. In 1901 the defendants commenced selling yeast cakes in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between. The plaintiff did not use cream in the preparation of his yeast, but the defendants actually used Jersey cream in theirs :—

*Held*, that the plaintiff's trade mark, if he was entitled to register it, was not infringed by the defendants' label.

*Held*, also, reversing the decision of Street, J., 4 O.L.R. 300, that the plaintiff had not acquired the exclusive right to use the name "Cream Yeast," and was not entitled to have the defendants' restrained from using it.

APPEAL by the defendants from the judgment of Street, J. 4 O.L.R. 300, in favour of the plaintiff in an action to restrain the defendant from infringing the plaintiff's trade mark and trade name, "Gillett's Cream Dry Hop Yeast," by selling yeast cakes under the name of "Jersey Cream Yeast." Street, J., held that the words "Cream Yeast" were not the proper subject of a trade mark, but that the plaintiff was entitled to succeed upon the ground that his yeast had acquired a reputation under the name of "Cream Yeast," and that he had a right of property therein which had been infringed by the defendants.

The appeal was heard by a Divisional Court composed of BOYD, C., MACLAREN, J. A., and FERGUSON, J., on the 11th and 12th May, 1903.

*G. F. Shepley*, K.C., and *F. C. Cooke*, for the defendants. The plaintiff has been found not entitled to protection of his alleged trade mark. He could acquire no property in the word "Creain," which is merely descriptive. Even if he could acquire a property, it has not been interfered with by the defendants. They have not used the word without distinguishing it on the labels, if it is calculated to deceive the public. We refer to *Reddaway v. Banham*, [1896] A.C. 199; *Cope v*

*Evans* (1874), L.R. 18 Eq. 138; *Parsons v. Gillespie*, [1898] A.C. 239; *Cellular Clothing Co. v. Maxton*, [1899] A.C. 326; *Payton v. Snelling*, [1901] A.C. 308. The judgment is, at all events, not in the proper form of an injunction in a trade name case. *Seixo v. Provezende* (1865), L.R. 1 Ch. 192; *Thompson v. Montgomery* (1888-9), 41 Ch. D. 35, [1891] A.C. 217; *Birmingham Vinegar Brewery Co. v. Powell*, [1897] A.C. 710; *Grand Hotel Co. of Caledonia v. Wilson* (1902), 5 O.L.R. 141.

*C. A. Masten* and *J. H. Spence*, for the plaintiff. The question whether the plaintiff has acquired the right to protection of a trade name is purely one of fact; *Wolff v. Nopitsch* (1900), 18 Pat. Cas. 27, 33; *Birmingham Vinegar Brewery Co. v. Powell*, [1897] A.C. 710, at pp. 715, 716. On this subject generally, see the remarks in Kerly on Trade Marks, 2nd ed., pp. 12, 14, 15, 16. To restrain the use of a trade name it is not necessary to show fraud and deceit: *Cellular Clothing Co. v. Maxton*, [1899] A.C. 326; *Chivers v. Chivers* (1900), 17 Pat. Cas. 420, 426, 427, 429. The right to the benefit of a trade name is the right of property, and when once acquired it exists unless something is done to cancel it: *Hall v. Barrows* (1863), 4 DeG.J.&S. 150; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15, 32, 33; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449, 453, 454. No cases are to be found as to the abandonment of trade names. The cases on the abandonment of trade marks shew that there was no abandonment here: *Mouson v. Boehm* (1884), 26 Ch. D. 398; *In re Grossmith's Trade Mark* (1889), 6 Pat. Cas. 180, 60 L.T. N.S. 612; *Daniel v. Whitehouse*, [1898] 1 Ch. 685; Kerly, 2nd ed., pp. 346, 483. This is a good trade mark, although the Judge at the trial has not so found. We rely on *Provident Chemical Works v. Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545, 549; *Radam v. Shaw* (1897), 28 O.R. 612; *Reinhardt v. Spalding* (1879), 28 W.R. 300; *Thompson v. Montgomery* 41 Ch. D. 35; *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, [1898] A.C. 571, 576, 579; *Groff v. Snow Drift Baking Powder Co.* (1889), 2 Ex. C.R. 568.

*Shepley*, in reply. "Cream" is purely a descriptive word and not capable of being a trade mark. The plaintiff has no

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right to the exclusive use of it even if it is part of a good trade mark. The trade mark consists of the label with, etc.: Kerly, 2nd ed., p. 370; *Lever v. Beddingfield* (1898), 16 Pat. Cas. 3; *Beddow v. Boyd* (1887), 4 Pat. Cas. 310; *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, [1898] A.C. at pp. 580, 583. "Cream" is accurately descriptive of the defendants' yeast; not so of the plaintiff's, but only metaphysically so.

June 5. BOYD, C.:—The plaintiff puts his case on this, that he is entitled to the exclusive use of the word "Cream" in connection with yeast. It is not contended that there is any similarity by the make-up of the goods in the packages of the defendants with those of the plaintiff—the appeal to the eye would inform any one of the difference—but in ordering cream yeast, which the plaintiff's is called, there would be "awkwardness" in confounding the defendants' Jersey cream yeast with it. There is no proof of actual deception—but all rests on the opinion of the manager of the plaintiff.

There was no proof of advertising the plaintiff's goods as "Cream Yeast" prior to the defendants' use of the name complained of. The evidence at most puts it thus, that an order for "cream yeast" might cause confusion between plaintiff's and defendants' products; but the same witness says that the defendants' output is known to the trade as "Jersey Cream Yeast." The defence shews that the name of "Jersey Cream" was honestly come by, being used by the defendants in baking powder since 1890—and repels any idea of fraudulent appropriation, though that this is not essential in passing-off cases. It makes in the same direction of honest dealing, that the article made by the plaintiff was not in the market and advertised and openly vended when the defendants began to use "Jersey Cream" in yeast cakes—the sale had been for years in abeyance—though that is not fatal to the plaintiff's right to recover, if otherwise entitled. There is no copying of any part of the plaintiff's label as to directions by the defendants, as Mr. Justice Street appears erroneously to have thought.



Assume that the plaintiff has a trade mark or label in which the words "Cream Yeast" are used, yet there is no invasion of this on defendants' part—there is no colourable imitation of the whole thing—which is the trade mark.

Then I think this case is covered by the "nourishing stout" case, *Raggett v. Findlater* (1873), L.R. 17 Eq. 29. "Cream" is used by the plaintiff merely as a descriptive word to suggest the frothing appearance of the yeast as it works (yeast froths like cream), and, as a word in common use to indicate a creamy, frothy look, it is not to be monopolized by the plaintiff: *In re Smokeless Powder Co.'s Trade Mark*, [1892] 1 Ch. 590, at pp. 594-6. To adapt the language of Malins, V.-C., in the case cited, "the word 'Jersey' completely distinguishes it from the plaintiff's, as does also the character and form of the label:" L.R. 17 Eq. at p. 43. There is no evidence going to shew that the user of the words by the plaintiff has been so long and so exclusive as to make the descriptive term in any sense distinctive. Besides, Jersey cream is actually used in the defendants' preparation, and a man may state the fact on his label without being exposed to injunction: see *per Fry, L.J.*, in *Turton v. Turton* (1889), 42 Ch. D. 128, at p. 147.

Here there is no obvious imitation by the defendants of the plaintiff's label or of the words he uses in it, judged by ocular inspection; and, according to the latest decision, "the eyesight of the Judge is the ultimate test:" *per Farwell, J.*, in *Bourne v. Swan*, [1903] 1 Ch. 211, 229. My brother Ferguson has gone more fully into the details of the case, but I agree in this result, that the action fails and should be dismissed with costs, and the appeal allowed with costs.

FERGUSON, J.:—The plaintiff is and has for many years been manufacturing and selling a certain kind of yeast in respect of which he applied for and obtained the registration of a trade mark as early as the year 1877. In the year 1894 he obtained another registration of the same trade mark. Upon this latter registration the plaintiff relies in this action. This trade mark to be applied to the sale of yeast cakes consists of a label bearing the representation of the head and bust of a woman

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and the words "Dry Hop" on either side, together with the words "Cream Yeast" below.

The defendants since the year 1892 have owned a trade mark for baking powder, being the words "Jersey Cream Baking Powder," with a picture of two Jersey cows and a milkmaid, but until the year 1901 they did not apply the words "Jersey Cream" to yeast cakes. In that year, 1901, the defendants commenced selling yeast cakes in packages with labels thereon "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top of the label and the words "Yeast Cake" at the bottom, with the picture or representation of the two Jersey cows and milkmaid between, and of this the plaintiff complains as being an infringement of his trade mark.

The plaintiff claims the right to the exclusive use of the term "Cream Yeast." The plaintiff shews in his evidence that in or about the year 1875 he got a trade mark for "Royal Yeast," and ever since that time his goods were mainly known by that name. William Dobie, the manager of the plaintiff's business in Canada, giving evidence for the plaintiff, said that ever since 1875 the "Royal" has been the plaintiff's leading brand of yeast, and that the plaintiff since that time has sold about 500 boxes of the "Royal" for every box of the "Cream" that he has sold. The same witness says that the "Royal" superseded the "Cream," and such was the intention of the plaintiff. It appears that during this long period the plaintiff has sold only a small quantity of his "Cream Yeast," but that he had the labels on hand and could furnish the "Cream Yeast" in a short time if called for by intending purchasers. This witness says that the plaintiff stands upon his alleged exclusive right to the use of the word "Cream," and he does not claim that there is any similarity in the packages used by the plaintiff and defendants respectively. From this I understand that the plaintiff treats the word "Cream" as a distinctive and not a descriptive word, and so rests his contention. It also appears that cream is not a component part of his manufacture, that no cream whatever is used in his manufacture. It appears, too, that about the time of the commencement of the alleged infringement an effort was made by the plaintiff, under the advice of his solicitor, to place larger

quantities of his "Cream Yeast" upon the market, or at least to make it appear that he was selling larger quantities than had been sold for a long period before.

As before stated, the plaintiff places his alleged right upon the use of the word "Cream." He complains that the defendants are using this word, and therefore, as I understand his contention, infringing this part of his registered trade mark. He does not seem to complain of anything beyond this, so far as the registered trade mark has concern.

In Kerly's Law of Trade Marks, 2nd ed., at p. 372, it is said: "The right of the registered proprietor exists in regard to the whole mark, not in regard to any particular part of it, and an infringement must be an infringement of the whole mark. But the adoption of a single characteristic and distinctive particular form the plaintiff's mark, and its use alone, or with other matter, may well be an infringement of the entire mark. At any rate, it throws upon the defendants the onus of proving the contrary. But it is not an infringement to take non-essential particulars from a mark: for instance, to take merely descriptive or other common words." I assume that it will not be questioned that this is a fair statement of the law in respect of the matters involved in it. The author seems to have been careful in referring to his authorities, and, so far as I have been able to see, the statement is correct.

For the purposes of what I am about to say now, it may be assumed that the plaintiff's mark was properly registered. The learned trial Judge was, as appears by his judgment, 4 O.L.R. 300, of the contrary opinion. The judgment, however, of the Court of Appeal in the case *Provident Chemical Works v. Canada Chemical Manufacturing Co.*, 4 O.L.R. 545, at p. 550, since the decision of the learned trial Judge in this case (now appealed from) may cast a somewhat different shade upon the subject. The registered trade mark of the plaintiff certainly contains the word "Cream," on which he places his reliance here. The defendants adopted and are using the expression "Jersey Cream," which as certainly contains the word "Cream." Let it then be assumed in the plaintiff's favour that the defendants are using a characteristic and distinctive

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particular of plaintiff's trade mark, which is assuming much in the plaintiff's favour. Yet this is not, *ipso facto*, an infringement of the mark. The further question arises as to whether or not the use the defendants are making of the word "Cream" with other matters is calculated to deceive the public into the belief that they are buying the plaintiff's manufacture when they really purchase the defendants' manufacture under their, the defendants' labels. It may well be that on this question the burden is upon the defendants. It is a subject upon which the evidence of witnesses can be given and received. The evidence on the subject given in this case was, to my mind, of very feeble character. In the case *Payton v. Snelling*, [1901] A.C. 308, at p. 311, Lord Macnaghten said, amongst other things, that this is not a matter for the witnesses but for the Judge—"the Judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness."

Now, placing myself as well as I can in the position so graphically defined by Lord Macnaghten, I am entirely unable to see how the public can be so deceived by the defendants' label or the use they are making of it. Even assuming the onus in respect of this question to be upon the defendants, I think the solution of it clearly in their favour. The plaintiff in the argument conceded that he does not claim that there is any similarity in the packages used by him and the defendants respectively, and I cannot see how the use of the words used by the defendants, as they are used, can have the effect contended for by the plaintiff. I may here say that counsel on the argument said that the Court need not trouble itself by any consideration of the small print upon the labels respectively.

For these reasons I am of the opinion that, even conceding that the registration of the plaintiff's mark is in every respect good, it is not shewn that there has been any infringement of it by the defendants, and I think it appears plainly that the defendants have not infringed it.

The other right or title claimed by the plaintiff he states in this way: "The plaintiff, by his long and sole use thereof, has acquired the exclusive right to use the words "Cream Yeast" for the purpose of distinguishing and designating yeast and yeast cakes manufactured and produced by him, and the said

yeast and yeast cakes have acquired a very valuable and extensive reputation for excellence in quality." The plaintiff continues by saying that the said trade name "Cream Yeast" is of great value to the plaintiff, and is recognized by the trade and the public as an indication and assurance both that the goods marked therewith are the goods of the plaintiff, and that they are of superior quality, and they are in greater demand than the goods manufactured and sold by the defendants. The plaintiff then asserts what he denominates an infringement by the defendants.

The evidence shews that the plaintiff does not use cream of any kind in the manufacture of the goods—cream of any kind does not enter into the manufacture or composition of the plaintiff's goods.

What the defendants have done is to manufacture and sell yeast cakes. In the manufacture of these they use large and substantial quantities of cream from the Jersey cow, said to be superior to cream from the ordinary cow, and to sell these under their label, which describes them as "Jersey Cream Yeast Cakes," which upon the evidence must be found to be a fair, candid, and, so far as it goes, an actual description of their manufacture. The plaintiff cannot, I think, properly complain of this, unless, at all events, it appears that this conduct of the defendants is calculated to deceive the public into the belief that when they are purchasing the defendants' goods they are getting goods manufactured by the plaintiff and for sale by him under the words or name that he professes to have acquired the exclusive use of by long user, namely, "Cream Yeast;" and, after the best consideration I have been able to give the evidence and all that has been brought before the Court, I am of the opinion that this does not appear. I am, for these reasons, of the opinion that the plaintiff fails upon both branches of his case.

I am of the opinion that the action should be dismissed and the injunction dissolved with costs, and that this appeal should be allowed with costs.

MACLAREN, J.A. :—I concur in the result of the judgments of the Chancellor and Ferguson, J.

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## [DIVISIONAL COURT.]

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RE TAGGART V. BENNETT.

May 11.

*Appeal—Interlocutory Order—Varying Minutes—Con. Rule 625. sub-sec. 2—  
County Judge Certifying Papers.*

An order made by a county court Judge dismissing an application to vary minutes under Con. Rule 625, sub-sec. 2, is an interlocutory and not a final order.

But:—The fact that there may be no appeal from such an order is no reason why the Judge should not certify the papers; the question whether or not there is an appeal from such an order is for the Court appealed to and such certificate should as a rule be given upon request: the Judge's duty being ministerial only.

APPLICATION for mandamus to compel the Senior Judge of the county of Middlesex to certify the proceedings in this case, pursuant to section 55 of the County Courts Act, so as to permit an appeal to a Divisional Court against an order of the Judge dismissing, an application to vary the minutes of the judgment herein.

The motion was made in Chambers, at London, on the 9th of May, 1903, before BRITTON, J.

*W. H. Bartram*, for the motion.

*E. W. M. Flock*, for the Judge.

May 11. BRITTON, J.:—The history of this litigation is as follows:—

(1) The plaintiff recovered judgment in the county court of the county of Middlesex for \$41.09, and division court costs.

(2) The plaintiff appealed against this judgment to the Divisional Court. The appeal was dismissed with costs, and these costs were taxed at \$36.12. The certificate of dismissal and of taxation was sent to the county court.

(3) The clerk of the county court, in settling the minutes of the judgment, assumed, against the will of the plaintiff, to set off these appeal costs against the plaintiff's verdict, and he entered the judgment for the difference, viz., \$4.97, in favour of plaintiff, with division court costs.



(4) The plaintiff then applied to Meredith, C.J.C.P., for a mandamus to compel the clerk to put this matter right. This application was dismissed.

(5) The plaintiff then appealed to the Divisional Court against the order of Meredith, C.J., and that appeal was dismissed.

(6) The plaintiff then applied to the Senior Judge of the county court, under Con. Rule 625, sub-sec. 2, to have the minutes of judgment varied. That motion was dismissed.

And it is from the order dismissing the latter motion that the plaintiff desires to appeal; contending that the order is a final order within the meaning of sec. 52 of "The County Courts Act," R.S.O. 1897, ch. 55.

For the purpose of perfecting his appeal, the plaintiff applied to the learned county court Judge for his certificate, which was refused.

This motion is, therefore, for a mandamus to the Judge compelling him to certify the pleadings, etc., etc., in the suit.

The fact that there may be no appeal from this order is no reason why the county Judge should not certify the papers.

Whether there is an appeal or not, is for the Court appealed to, and could be disposed of on motion to quash, or upon the argument.

The Judge's duty is ministerial; and, with all deference, I think the certificate should, as a rule, be given upon request.

The solicitor has a duty to his client, and takes all the responsibility in a matter of this kind.

It was, however, frankly conceded by Mr. Bartram, on the argument, that if the order could not be successfully appealed against, this motion should not succeed.

I have looked at all the cases available within the time at my disposal, and am of opinion that this order is an "interlocutory" one within the meaning of section 52 of "The County Courts Act."

In *Blakey v. Latham* (1889), 43 Ch. D. 23, the plaintiff brought an action, which was dismissed with costs. He appealed, and his appeal was dismissed with costs. The plaintiff moved to set off these costs, for which he was liable to defendant,

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against certain costs for which the defendant was liable to him; some costs in same action, and some in another action.

Kay, J., made an order allowing the set-off, but in the second action made the set-off subject to the solicitor's lien. Held, on appeal from this order, that the order was not a "final order," but was "interlocutory." See *Rural Municipality of Morris v. The London and Canadian Loan and Agency Co.* (1891), 19 S.C.R. 434, at p. 442, where the words "final judgment" are considered.

An order by a Judge of a county court to strike out a jury notice was held not appealable in *McPherson v. Wilson* (1890), 13 P.R. 339. See *O'Donnell v. Guinane* (1897), 28 O.R. 389; *Fisken v. Stewart* (1897), 17 C.L.T. Occ.N. 82; *Hunter v. Hunter* (1898), 18 C.L.T. Occ.N. 114; *Hastings v. Ernest* (1850), 7 U.C.R. 520, all cited in *Holmsted & Langton*, at p. 983.

In many cases the order is final upon a particular point or part of the case, but not final as disposing of a right or claim within the meaning of section 52.

I venture to say, in conclusion, that while the clerk intended to do substantial justice between the parties in this case, and in such cases generally, substantial justice would be done and expense saved by adopting this mode of set-off, yet incorporating the certificate of dismissal of appeal, and setting off costs, is no part of what is ordinarily understood as settling minutes of the judgment in the Court below.

The plaintiff was entitled to his judgment and execution.

The defendant was entitled to his order, which is a judgment, and was entitled to issue an execution upon it.

The Judge of the county court had the power on motion, subject to solicitor's lien for costs, to direct set off between the parties.

Possibly the Judge's order refusing to vary the minutes might be considered as an order to set off.

I do not so decide, but simply dismiss the plaintiff's motion, and without costs, in the hope that this protracted and expensive litigation, involving originally so small an amount, will now be ended.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 10th of June, 1903, before BOYD, C., FERGUSON, and MACMAHON, JJ.

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*W. H. Bartram*, for the appeal.

No one appeared for the Judge.

June 11. BOYD, C.:—The county Judge has declined to vary the minutes of an order for judgment as settled by the clerk of the Court, and it is now sought to get relief in this Court, either by way of mandamus or otherwise, to the end that these minutes may be varied as the applicant desires.

This is a matter interlocutory, from which no appeal lies under R.S.O. 1897, ch. 55, sec. 52; while provision is made for appealing from a decision of the Judge made under powers conferred by the rules of court (*e.g.*, as to settling minutes), yet the last part of the section controls all the rest, and it is only in case the decision is in its nature final that appeal lies.

This is a mere interlocutory ruling which will issue in final judgment, and from that judgment of the Court (if it be appealable) the appeal lies, and not from a proceeding which is but a step towards that judgment. No order.

FERGUSON and MACMAHON, JJ., concurred.

G. A. B.

## [IN THE COURT OF APPEAL.]

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DOHERTY ET AL. V. MILLERS AND MANUFACTURERS INS. CO.

Feb. 2.

*Insurance—Fire Insurance—Annual Renewal—Proposal for Increased Premium  
—Non-Acceptance—Condition of Payment in Advance—Delivery of Receipt  
—Waiver.*

THIS was an appeal by the plaintiff from the judgment of Street, J., reported 4 O.L.R. 303.

The appeal was heard before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on February 2nd, 1903.

*G. F. Shepley*, K.C., and *W. Proudfoot*, K.C., for the appellants.

*J. H. Moss*, and *C. A. Moss*, for the respondents.

The Court unanimously dismissed the appeal on the ground that there had been no renewal contract of insurance.

A. H. F. L

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## [DIVISIONAL COURT.]

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May 18.

THE MUNICIPAL CORPORATION OF THE TOWN OF WALKERTON.

*Municipal Corporations—Money By-law—Procedure By-law—Violation of—Discretion.*

The Court in the exercise of its discretion refused, under the circumstances set out in the case, to restrain a municipal council from acting upon a by-law for the payment of money not provided for on the face of the estimates, passed against the protest of the minority of the council and in contravention of the procedure by-law of the council, by being taken up by the full council before being submitted to a committee of the whole.

STREET, J., dissenting.

THIS was an appeal from a judgment at the trial.

The following facts are taken from the judgment of STREET, J., in the Divisional Court:—

This is an action brought by a ratepayer to restrain the defendants, the municipal corporation of the town of Walkerton, from paying to Mr. Cryderman, the mayor of the town, the sum of \$125 as remuneration for his services as mayor during the year 1902.

An *ex parte* injunction was granted by the local Judge of the High Court, and a motion to continue this injunction to the hearing coming on before the Chancellor of Ontario, on 8th January, 1903, was by consent turned into a motion for judgment, and judgment was given dismissing the action with costs.

From this judgment the plaintiff appealed, and the appeal was argued on the 11th of February, 1903, before a Divisional Court composed of FALCONBRIDGE, C. J. K. B., STREET and BRITTON, JJ.

J. E. Jones, for the appeal. The plaintiff has the right to bring this action: sec. 378 of ch. 223, R.S.O. 1897. The by-law in question was not passed by a two-thirds majority—seven members being present, and only four voting for it. The procedure by-law passed by and governing the council calls for “a two-thirds majority of the members present:” that would



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require five in this case. "Members present" mean members actually present whether voting or not, and the mayor being present, should be counted even if he did not vote, because he was interested. The by-law was not submitted to a committee of the whole, as provided for by the procedure by-law—there the mayor would not have been in the chair, and the discussion would have been much more unrestrained. It was not sealed before it was acted on: *In the Matter of Croft and the Municipality of the Township of Brooke* (1858), 17 U.C.R. 269; *Re Mottashed and The Corporation of the County of Prince Edward* (1870), 30 U.C.R. 74; *Re Wilson and The Corporation of the Town of Ingersoll* (1894), 25 O.R. 439.

A. Shaw, K.C., contra. The plaintiff is not a ratepayer. He is assessed merely as an occupant of his wife's property. He has not joined other ratepayers as plaintiffs in the action with himself, and he is not sufficiently interested to justify an injunction: Kerr on Injunctions, 3rd ed., p. 22; *Regina v. The District Council of the District of Gore* (1848), 5 U.C.R. 357. Even if the by-law was not submitted to the committee of the whole, it was to the finance committee, and was passed by the whole council, and the money has been paid over, and nothing now can be gained by an injunction: *Daniels v. The Municipal Council of the Township of Burford* (1853), 10 U.C.R. 478. It was a slight irregularity: *Boulton and The Town Council of the Town of Peterborough* (1857), 16 U.C.R. 380. A majority of the council was sufficient to carry the by-law: *The Municipality of the Township of Brock v. The Toronto and Nipissing R.W. Co.* (1870), 17 Gr. 425. The Court cannot try the validity of a by-law by an action brought by the plaintiff. He should proceed by motion to quash the by-law under the Municipal Act, R.S.O. ch. 223, sec. 378; *Vandecar v. The Corporation of East Oxford* (1878), 3 A.R. 131.

Jones, in reply, referred to *Jenkins v. The Corporation of the County of Elgin* (1871), 21 C.P. 325, as to the meaning of the word "majority."

May 18. BRITTON, J.:—In this case the learned Chancellor refused to continue an injunction granted by the local Judge at Walkerton.

The motion to continue the injunction was, by consent of parties, turned into a motion for judgment, and the Chancellor dismissed the action. This is an appeal from that decision.

The plaintiff has no merits in this case; and, applying the words of the statute giving jurisdiction as to injunctions, I do not think this a case in which "it is *just or convenient*" that an order for an injunction should be made.

The by-law which is challenged was as fully considered by the council, and by the same members, as if considered in committee of the whole. The money was on hand. The majority of the council of 1902 desired that this money should be paid. The action is defended; so it is evident that the council of 1903 does not sympathize with or concur in the plaintiff's action.

The plaintiff technically has a right to bring an action; and he has done so instead of moving to quash the by-law; but there is no evidence that the ratepayers, the persons mainly interested, are with the plaintiff, or are objecting to the proposed payment of the small sum mentioned to the mayor of 1902. The inference, from the material before us, is rather the other way.

The plaintiff is hostile to the late mayor, and he ought not to be allowed to thwart the will of the council merely because, by a slip, the council did not consider the by-law in committee of the whole council, instead of considering it as a council.

If there can be a case, in which it can be said that there is any discretionary power on the part of the Court or a Judge as to granting or refusing an injunction, this is such a case.

No doubt the majority of the council desired to recoup the mayor, to some extent, for his loss in law costs incurred in the action brought against him by the plaintiff. This law suit was against the mayor for what he did as mayor, and for what he did in the interest, or supposed interest, of the town.

I see no objection to this course; but, unfortunately, the council did not comply with the by-law they had previously passed, in putting the by-law in question through its different stages.

The plaintiff's examination as a judgment debtor is in, and it shews him to be a shifty man—not candid or frank; and

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that he will never, if he can avoid it, pay one penny of the judgment; and it seems to me, perfectly clear upon the evidence, that this action was not brought by him in the interest of the ratepayers, but purely as a personal matter to prevent Cryderman receiving anything to reduce his loss.

As to discretion, see *Doherty v. Allman* (1878), 3 App. Cas. 709.

If instead of the action and motion for judgment, the plaintiff had moved to quash the by-law, the Court might, in the exercise of its discretionary power, refuse to quash: see *In re Huson and The Township of South Norwich* (1892), 19 A.R. 343; 21 S.C.R. 669.

In the exercise of our discretion, under the circumstances of this case, we should not allow the appeal.

FALCONBRIDGE, C.J.:—I agree in the result of my brother BRITTON'S judgment. This appeal will, therefore, be dismissed with costs.

STREET, J.:—The simple question to be determined upon the present appeal appears to be whether a municipal council, which has passed a by-law under section 326 of the Municipal Act for governing the proceedings of the council, is at liberty to disregard its provisions. The plaintiff in the present action was a member of the council in the year 1902, and having been removed by the order of the mayor, Mr. Cryderman, from the council-room at one of its meetings for disorderly conduct, he brought an action against the mayor, which was tried and dismissed with costs which costs the mayor has been unable to collect.

When the estimates for the year 1902 were approved by the council, a sum of \$300 was inserted in them, under the heading "law costs, etc.," and it is stated by the mayor, and four out of the six members of the council, and denied by the plaintiff and the other member, that it was well understood at the time of the passing of the estimates, that this item of \$300 was intended to cover a sum of \$125 to be paid to the mayor as remuneration for his services for the year, in order to provide

him with funds to pay the costs he had incurred in defending himself against the action of the plaintiff.

At a meeting of the council, held on 13th June, 1902, at which the plaintiff was not present, a by-law was read a first time "to remunerate the mayor for the present year," three members voting in favour of, and two members against it.

Nothing further was done until the meeting of 8th December, 1902, when the following resolutions were carried: four members voting for, and two against them.

"That by-law to remunerate the mayor for services be now read a second and third time, and finally passed, signed, and sealed."

"That by-law to remunerate the mayor be referred to the finance committee to provide means."

The finance committee at once reported as follows: "Your committee beg to report as follows: *Re* by-law to remunerate the mayor: your committee beg to report that funds for same be provided for from the general funds."

This report was adopted by the council by the same vote of four to two, and the by-law was then read a third time, and ordered to be signed and sealed by the same vote, and was then duly signed, and it was sealed the next morning.

Objection was taken at this meeting by the plaintiff, Heffernan, and another member who voted with him in the negative throughout, that the by-law should not be passed, because the item of \$125 was not included in the estimates for the year. One of the other members stated that it was included in the item of \$300 for "law costs, etc.," but the plaintiff objected so strongly that it had not been put in the estimates, that to overcome the objection, it was referred to the finance committee as above mentioned, and they reported that it be paid out of the general funds.

The mayor was present, and presided at the meeting on 8th December, 1902, but did not vote: he ruled, however, upon the objections made by the plaintiff that there was not a two-thirds vote, in favour of the resolutions.

The question as to whether the council should go into committee of the whole upon the resolutions was raised by the plaintiff, and discussed informally at the meeting of 8th

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December, 1902; but the majority being of opinion that the \$125 was included in the estimates under the head of "law costs, etc.," it was decided by the majority that it was unnecessary to do so.

On the night of the meeting of 8th December, 1902, a cheque on the Merchants' Bank, Walkerton, in which the treasurer of the town kept the monies in his hands, was drawn by the clerk, and signed by him and the mayor, in favour of the mayor for \$125: the treasurer signed it the next morning, and the mayor deposited it to the credit of his own private account in the Canadian Bank of Commerce; but before it was presented at the Merchants' Bank, the plaintiff had obtained his injunction restraining the defendants from paying the amount or acting on the by-law; and notice being given to the Merchants' Bank, they refused to pay the cheque when it was presented.

By-law No. 675, entitled "A by-law to regulate the proceedings in the municipal council of the corporation of the town of Walkerton," had been passed on 14th May, 1900, and was in force at the time the proceedings now in question took place.

By section 42 of this by-law, it is provided that no motion to rescind any resolution or to introduce a by-law to repeal another by-law shall be received or put unless notice of it shall have been made in writing at a previous meeting.

By section 84, any appropriation of money amounting to \$25 and over shall be submitted to a committee of the whole before being taken up in full council.

By section 85. After the passing of the estimates for the year, any by-law proposing an expenditure of money shall receive a two-thirds vote of the members present, and shall then be referred to the finance committee to report ways and means.

By section 26. Every member present when a question is put shall vote thereon unless he is personally interested on the question, and such interest is resolvable into a personal profit peculiar to the member, and is not in common with the interests of the citizens at large, in which case he shall not vote.

The objections to the by-law are:—



1. Under section 84 of by-law No. 675, that it provides for an appropriation of money exceeding \$25, and that the question was not at any time submitted to a committee of the whole.

2. That it did not receive a two-thirds vote of the members present, as required by section 85, because the mayor, being a member, was present, and made the seventh member, so that five votes were required to make up a two-thirds vote of the members present.

3. That the item of \$125 should not be held to have been included in the estimates for the year.

4. That the by-law had not been sealed at the time it was acted upon.

In my opinion the by-law had been actually sealed before the cheque was signed by the treasurer. I think, also, that as the mayor, by reason of his personal interest in the matter, was precluded from voting, he should not be counted as one of the members present within the meaning of section 85, and that the vote of four against two was therefore a two-thirds vote upon the question. My view is, that, being by section 26 prohibited from voting, it was a matter of no importance whether he was actually in the room or not: he ceased for the moment to have the rights of a member, and should not be permitted by the accident of his being within or outside of the room to affect the result either way.

I am of opinion, however, that the contention of the defendants upon the other objections cannot be supported.

In the first place, it appears to me that it would be improper to hold that an appropriation to pay the mayor \$125 for his services during the year was included in the appropriation of \$300 for "law costs, etc.," when the estimates were passed in September.

At that time a by-law for the payment to the mayor of \$125 had already been read a first time; and if the finance committee, who prepared and submitted the estimates for the year, intended to pay the mayor \$125, and to make an appropriation for the purpose; or, if they intended to pay \$125 for his costs of defending the action brought by Heffernan, it was their duty to make an appropriation in plain language for the purpose.

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The plaintiff Heffernan and one other member of the council, who has voted with him throughout, swear that they were never made aware of the inclusion of \$125 for the mayor in the item of \$300 for "law costs, etc.," and it is not difficult to understand that it was not intended that they should know of it.

The remaining question is whether the defendants can insist that a by-law for an appropriation of \$125, not provided for on the face of the estimates, can be held valid where it has been rushed through at a meeting of the council, without regard to the safeguard which the 84th section of the by-law No. 675 has provided, namely, that it shall be submitted to a committee of the whole, before being taken up in full council.

This objection appears to have been specifically taken at the time by the plaintiff, but the objection was set aside by the majority upon the ground that the amount had been already passed in the estimates for the year under the head of "law costs, etc."

In my opinion, the provisions of the by-law No. 675 are binding upon the council, and can be insisted upon by any member, and a by-law passed in disregard of its provisions, and of the protest of the minority, should not be supported when it is promptly attacked: see Dillon on Municipal Corporations, 4th ed., par. 309.

The plaintiff was a person who might have applied by motion to quash the by-law, and I think he is entitled to maintain an action to prevent its being enforced.

The result of the view I have expressed is that the present appeal should be allowed with costs; that the judgment entered for the defendants should be set aside, and judgment should be entered perpetually restraining the defendants from acting upon the by-law of 8th December, 1902, and ordering the defendants to pay the costs of the action.

G. A. B.

[FERGUSON, J.]

## CHARLETON v. BROOKS.

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July 23.

*Gift—Donatio mortis causâ—Moneys and notes—Delivery of keys.*

The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, and while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, and said, "all the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk.

There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant—she retained the keys until his death, which occurred from the same illness a fortnight afterwards:—

*Held*, that there was a good *donatio mortis causâ*.

*In re Mustapha, Mustapha v. Wedlake* (1891), 8 Times L.R. 160 followed.

THIS was an action by the administrators of the estate of William Charleton to recover certain moneys and promissory notes, the property of the said William Charleton in his lifetime, from the defendant, his daughter, who claimed them as a *donatio mortis causâ* under the circumstances set out in the judgment.

The action was tried at St. Thomas on June 25th, 1903, before FERGUSON, J., without a jury.

Glenn, K.C., and Leach, for the plaintiffs.

Macbeth, K.C., for the defendant.

The following cases were cited and references made by the plaintiffs: *Young v. Derenzy* (1879), 26 Gr. 509; *Travis v. Travis* (1886), 12 A.R. 438, at p. 443; *Powell v. Hellicar* (1858), 26 Beav. 261; *Hatch v. Atkinson* (1868), 56 Me. 324; *Hall v. Hall* (1891), 20 O.R. 684; *Walker v. Foster*, (1900), 30 S.C.R. 299; *McDonald v. McDonald*, (1903), 33 S.C.R. 145; Am. & En. Ency. of Law, 2nd ed., vol. 14, p. 1059.

The following cases were cited and references made by the defendant: *Hall v. Hall* (1890), 20 O.R. 168, at p. 173, *per* Rose, J.; *In re Mustapha, Mustapha v. Wedlake* (1891), 8 Times L.R. 160, referred to in Williams on Executors, 9th ed. 686; *McDonald v. McDonald*, 33 S.C.R., at p. 176, *per* Armour, J.

July 23. FERGUSON, J.:—The late William Charleton was, at the time of his death, in his 99th year. Yet, according to

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all the evidence on the subject, he retained all his faculties till his last illness, which lasted only two weeks.

He was taken ill on the fifth of January, 1903, and died on the nineteenth of the same month.

As to his having retained his faculties as above stated, there was at the trial no dispute.

He had been living for a time with his daughter, the defendant, and occupying a room in her house as his bedroom.

On the morning of the fifth of January, 1903, he breakfasted with the family. Shortly, very shortly, after breakfast, he became ill and went to his room and was suffering from a severe chill and shaking somewhat violently.

His daughter, the defendant, went to his room where he was lying on the bed but not undressed, and she was endeavouring to make him as comfortable as she could in the circumstances.

He had three keys in a small sack or wallet in his pocket.

It appears that he had some foreboding or suspicion, that this would be his last illness, for he said that he hoped he would shake on to the end.

He took the keys from his pocket and handed them to the defendant, saying, "All the money and notes I have got are yours." One of the keys was the key of his box or trunk which was in the room; another was the key of a small cash box which was then in the trunk, and the third was the key of a wardrobe or chest of drawers.

The defendant took the keys, and taking them out of the little sack or wallet examined them, and has kept them ever since.

In the cash box in the trunk were the promissory notes and cash in question in this action, and of these the defendant has retained possession, as well as in my view, possession of the trunk and cash box ever since.

There was in the trunk nothing of any appreciable value excepting the cash box and what was in it [and the money and notes in question were in it].

As to what is stated here respecting the gift, the evidence of the defendant is corroborated by that of her son who was present at the time.



The plaintiffs are the administrators of the estate of the late William Charleton, and their action is to recover this property [the money and the notes] from the defendant.

The defendant claims title to the property as *donatio mortis causá* from William Charleton. There is no question as to his having died of the illness that was upon him at the time of the alleged gift; nor any questions, but the one, namely, was what occurred, the words employed and what was done sufficient to operate the gift of the kind alleged by the defendant?

There was evidence that the donor had intended to give what property he might have to this defendant.

I do not think that I am called upon to elaborate this judgment as has been done in many, if not most, cases of this character. The decision in the case of *Mustapha v. Wedlake*, first reported in the Weekly Notes, 1891, December 19th, and afterwards in 8 Times L.R. 160 (at length) as *In re Mustapha*, *Mustapha v. Wedlake* seems to me to entirely cover the contentions in this case, and there, it was held, that there was a good *donatio mortis causá*. Indeed, I think the present case is stronger in favour of the gift than was that case. *Mustapha v. Wedlake* is mentioned but not commented upon by the late lamented Chief Justice Armour, when a Judge of the Supreme Court of Canada in the case of *McDonald v. McDonald*, 33 S.C.R. 145.

I am of opinion that the *donatio mortis causá*, contended for by the defendant, was and is a good gift, and that the action so far as it relates to the money and notes should be dismissed. These are what the defendant defends for, and there was no evidence given as to the other property mentioned in the statement of claim.

The defendant counter-claims for the amount of a doctor's bill and funeral expenses paid by her. These amount to \$67.50, and I think there should be judgment for defendant and against the plaintiffs in their representative character for this sum.

The action will be dismissed with costs against the plaintiffs in their representative character. The costs do not seem to have been increased apparently by the counter-claim and I need not say anything about the costs of this.

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[STREET, J.]

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May 30.

## PALMER v. MICHIGAN CENTRAL R. W. Co.

*Railway—Farm Crossing—Approaches—Repair.*

Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto within the farm.

ACTION to recover damages for personal injuries sustained by the plaintiff, by reason of the alleged negligence of the defendants. The facts appear in the judgment.

The action was tried before STREET, J., with a jury at St. Thomas on the 21st April, 1903.

*J. A. Robinson*, for the plaintiff.

*I. F. Hellmuth*, K.C., and *E. C. Cattnach*, for the defendants.

May 30. STREET, J.:—The plaintiff was tenant to one Davis of a farm, being the west half of lot 10 in the 9th concession of Yarmouth, through which the defendants' line of railway passes, and the defendants some years ago constructed an overhead farm crossing, across their railway, for the use of the persons occupying the farm in question. The approach to the crossing extended beyond the boundary fence of the railway land into the farm occupied by the plaintiff. At the time the approach was made, the company offered to build it of earth with a grade of one foot in twenty, but, at the request of the owner, it was built with a grade of one foot in seven, with a covering of gravel. On the 26th August, 1902, the plaintiff, while descending the portion of the approach within his own fence, with a load of oats, was upset and injured. It appeared from the evidence that the approach to the crossing within the farm fences was out of repair, having been worn so that it sloped away to one side, and that the accident to the plaintiff was caused by this want of repair. No request had been made by the plaintiff or any other person to the defendants to repair

the approach, nor had any notice been given them that it was out of repair. The defendants moved for a nonsuit at the close of the case, upon the ground that no duty was shewn requiring the defendants to keep in repair the portion of the approach within the land occupied by the plaintiff, and that no request to repair had been made. I reserved my decision upon the motion, and at my request the jury answered certain questions. They found, in answer to the questions submitted, that the approach to the crossing on the farm side of the railway fence was out of repair at the time of the accident, and that the defendants were guilty of negligence in not keeping it in repair. They negatived any contributory negligence on the part of the plaintiff, and assessed the damages at \$800. Their finding that the defendants were guilty of negligence was based upon the assumption, which I asked them to make for the purposes of their verdict, that there was a duty cast upon the defendants by law to repair the crossing within the farm fence. The parties have since argued the question of nonsuit, which I reserved.

The liability of the defendants is founded upon the 191st section of the Railway Act, 51 Vict., ch. 29 (D.), which provides that "Every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles."

There appears to be no other clause in the Railway Act which imposes upon railway companies any further duties or responsibilities in relation to farm crossings.

The company are authorized by the Act, for the purposes of their undertaking, to divide a farm in two by running their line through it: they are obliged to compensate the owner for the damage done, and further to make a convenient crossing for him over their line of railway. They are obliged, in other words, to give him the easement of a convenient right of way over their line for his implements, carts, and other vehicles. The company do not appear to be either obliged or authorized to go upon the land of the owner for any purpose connected with the making of the crossing. If a convenient crossing cannot be made without the building of approaches on the

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J. land of the owner, then the presumption would be that the work upon his own land must be done by the owner, in the absence of a special agreement relating to it, and that the expense of such work must be taken into account in fixing the original compensation to be paid to him for the severance of his property by the owner. This would obviously be the case were the land owner affected injuriously in the construction of the railway, by being obliged to construct and keep in repair a greater length of drains upon his own land for instance. The case of *Town of Peterborough v. Grand Trunk R.W. Co.* (1900), 32 O.R. 154, affirmed by the Court of Appeal (1901), 1 O.L.R. 144, seems against the view that an implied liability exists compelling the company perpetually to keep in repair a work which is not upon their own land, even though originally constructed by them. There is no evidence here to support an agreement on the part of the company to do so in this case, and no such agreement is alleged.

The only want of repair complained of, and that to which the accident was due, was with regard to the approach upon the land occupied by the plaintiff, and I can find no duty, either express or implied, cast upon the defendants to keep this portion of the approach in repair. There was, therefore, no evidence to leave to the jury, and the defendants' motion for a nonsuit should be granted, and the action dismissed with costs.

T. T. R.

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[STREET, J.]

## DENISON V. TAYLOR ET AL.

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*Sale of Goods—Warranty—Correspondence—Construction—Breach—Damages.*

May 28.

The plaintiff, a private banker, wrote to the defendants, safe makers: "Can you give me a rough estimate of what a burglar proof door with proper frame complete will cost?" The defendants answered: "We can build you a burglar proof door of any size and description you wish. The cheapest door we now make is \$250 . . . our No. 67, the outer door being 1½ inches thick, the entire surface protected with hardened drill proof plate. . . . Next better quality of door to this is one 1½ inches thick at \$400, and the next at \$550." They enclosed cuts of three vault doors, Nos. 67, 68, and 69; the two latter were called "fire and burglar proof vault doors;" No. 67 was called "fire proof vault door with chilled steel lining:" and the printed note below the cut read, "The above cut represents our vault doors suitable for post offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door." The plaintiff replied: "Would No. 67 furnish a fair protection against burglars?" The defendants telegraphed: "No. 67 gives both fire and burglar proof protection." The plaintiff then ordered a No. 67 door, which was supplied to him and put into use. Shortly afterwards it was blown open by burglars, and this action was brought to recover damages for breach of warranty. It appeared from the evidence that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. The door having been taken to pieces during the trial, it was found that the centre layer of the three layers making up the door, which was represented to be hardened drill proof plate, was neither hardened nor drill proof, and was easily perforated by an ordinary hand drill in a minute and a half:—

*Held*, that the correspondence could not be construed as containing an absolute warranty on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time or place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safe makers could make them. Both warranties had been broken.

*Held*, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of those defects was not the reason why the burglars were able to break it open; but the plaintiff, having sustained a total loss by reason of the article supplied being valueless, was entitled to recover as damages the price, \$250.

THE plaintiff was a private banker, carrying on business at Niagara-on-the-Lake, and the defendants were safe makers, carrying on business at Toronto. The plaintiff alleged in his statement of claim that he entered into negotiations with the



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defendants in August and September, 1902, for the purchase by him from them of a fire and burglar proof vault door for the safekeeping of money and other valuables which were from time to time in his possession in the ordinary course of his business as a banker; that the defendants during the negotiations represented to the plaintiff that a certain vault door described in their catalogues and circulars as No. 67 was burglar proof and afforded fire and burglar proof protection; and further, that the outer door of the said vault door No 67 was  $1\frac{1}{8}$  inches thick, that the entire surface was protected with hardened drill proof plate . . . and that the same was built with a lining of chilled steel covering the entire surface of the outer door; and that the defendants warranted and guaranteed the truth of the facts aforesaid; that the defendants also entered into a certain guarantee or warranty with the plaintiff whereby they warranted and guaranteed that the said vault door No. 67 was fire and burglar proof and afforded fire and burglar proof protection; that the plaintiff, relying upon the truth of such representations and upon the guarantees and warranties aforesaid, purchased from the defendants a vault door No. 67 and paid them \$250 therefor; that the said vault door was not fit for the purposes for which it was intended, and was not burglar proof and did not furnish burglar proof protection; nor was the outer door thereof  $1\frac{1}{8}$  inches thick, nor was the entire surface protected with hardened drill-proof plate, nor with a lining of chilled steel; that, by reason of the misrepresentations and breaches of warranty aforesaid, burglars were able to open such vault door on the 11th November, 1902, and destroyed the said vault door and destroyed property in such vault to the value of \$200, and took therefrom money and valuables to the extent of \$1,800; and the plaintiff claimed \$250 for the said vault door, \$200 for the property so destroyed in his vault, and \$1,800 for the money and valuables taken away.

The defendants in their defence denied making any misrepresentations, and denied that they entered into the warranties alleged; they alleged that the vault door purchased by the plaintiff was known in the trade and to the plaintiff and the public as the fire and burglar proof description of door, and a



statement to a purchaser that such door was burglar proof would be understood to mean that it combined certain structural features used in the description of door described as burglar proof; that there were many varieties of such doors, ranging in price from \$250 to many thousands of dollars, as the plaintiff well knew, and that the plaintiff chose the cheapest of them, knowing that he must expect to receive a much less degree of protection against burglars than the purchaser of the most expensive would receive.

The action was tried at St. Catharines on the 5th, 6th, and 7th May, 1903, before STREET, J., without a jury.

*I. F. Hellmuth, K.C., and Shirley Denison, for the plaintiff.*

*Walter Cassels, K.C., and W. H. Blake, K.C., for the defendants.*

May 28. STREET, J.:—The plaintiff wrote the defendants on the 27th August, 1902, upon note paper headed "R. E. Denison, Banker:" "Can you give me a rough estimate of what a burglar proof door with proper frame complete will cost?" The defendants replied on 28th August, 1902: "We can build you a burglar proof door of any size and description you wish. The cheapest door we now make is \$250 . . . The door we have reference to is our No. 67, the outer door being  $1\frac{1}{8}$  inches thick, the entire surface protected with hardened drill proof plate. . . . Next better quality of door to this is one  $1\frac{1}{2}$  inches thick at \$400, and the next \$550." In this letter they enclosed cuts from their sample book of three vault doors called Nos. 67, 68, and 69; the two latter were called "Fire and Burglar Proof Vault Doors;" No. 67 was called "Fire Proof Vault Door with chilled steel lining;" and the printed note below the cut read as follows: "The above cut represents our vault doors suitable for post offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door."

The plaintiff replied to this: "Would No. 67 furnish a fair protection against burglars? Kindly answer this before Tuesday." The defendants replied on the 2nd September, 1902, by telegram: "Letter just received. Number 67 door gives both

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fire and burglar proof protection." On the 11th September the plaintiff wrote to the defendants: "Please forward by first boat vault door No. 67 referred to in our recent correspondence and draw on me for amount;" and on the same day the defendants wrote to the plaintiff accepting his order. On the 11th November, 1902, the plaintiff wrote the defendants that the door had been blown open by burglars, and that from the ease with which the lock was forced he thought the door was defective, and that he would look to them for his loss.

From the evidence I should come to the conclusion that the handle to the spindle by which the lock is turned had been knocked off and dynamite had been introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. It appears from the evidence that less than half an hour's work by an expert would accomplish this result. The door having been taken to pieces during the progress of the trial, it was found that the centre layer of the three layers making up the door, which was supposed and represented to be hardened drill proof plate, was neither hardened nor drill proof, and was easily perforated by an ordinary hand drill in a minute and a half.

I am asked by the plaintiff's counsel to construe the correspondence between the parties as containing an absolute warranty on the part of the defendants that the door furnished by them to the plaintiff was proof against the efforts of burglars, without qualification as to time or place. This, as has been pointed out in the cases, would in fact amount to a contract by the defendants insuring for years, if not for all time, the contents of the vault, whatever they might be, against burglars: *Walker v. Milner* (1866), 4 F. & F. 745; *Herring v. Skaggs* (1878), 62 Ala. 180; *Sanborn v. Herring* (1867), 6 Am. Law Reg. N.S. 457. Such a contract might, of course, be made, but the responsibility incurred under it would be so great, that the intention of the parties to make it ought clearly to appear.

I think the circumstances here negative an intention on the part of the defendants to give a warranty so far reaching; and it is apparent, I think, that the plaintiff did not expect or ask

for one. The wood cuts taken from the defendants' catalogue, which they sent him before the contract was made, shewed several doors, of which he chose the cheapest. The more expensive ones—those he rejected—were called "Fire and Burglar Proof Vault Doors :—" the one he chose was called only "Fire Proof Vault Door." He can not reasonably be supposed to have expected the same security against burglars from a cheap door, which the makers only called "fire proof," as from an expensive one, which they called burglar proof as well as fire proof. His view at the time was expressed by the terms of the letter he wrote them asking whether the door in question would furnish "a fair protection against burglars." The defendants' reply to this letter was a telegram that the door in question "gives both fire and burglar proof protection." It would be straining the language of this reply to construe it into a warranty that no fire, however hot and however long continued, could destroy the doors, and that no burglar, however skilful, could, with sufficient time at his disposal, break through them, and I must therefor, I think, determine that no absolute warranty or insurance of this kind was given. If no absolute warranty was given, then I think the warranty which was given is that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door in question would furnish "a fair protection against burglars." The defendants, therefore, I think, did warrant, in this part of the correspondence, that the door in question would furnish a fair, that is to say, a reasonable, protection against burglars; and, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate, which was composed of chilled steel. The warranty that the door would furnish a reasonable protection against burglars means, I think, that so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safe makers could make them. The more expensive doors had thicker plates, which enabled the manufacturers to make closer fitting spindles, and so offered, or were supposed to offer, greater protection against burglars than the door selected by the plaintiff.

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In my opinion, both the warranties I have referred to as having been given were broken. Through the negligence of the defendants' workmen, and not by any wilful act of the defendants, the door which they sold to the plaintiff was, as it now appears, lacking in the simplest and first requisite which should be found in a door intended to resist burglars, that is to say, a chilled steel or drill proof lining. The lining which was intended to be drill proof was there, but it had not been chilled, and could, therefore, be easily drilled in any part by an ordinary hand drill. This defect, however, was not taken advantage of by the burglars who robbed the plaintiff. They appear to have proceeded upon the assumption that the door was drill proof, and they adopted other means of introducing their explosive than by attempting to drill the door. I should find upon the evidence before me that, even had their door been as complete as doors of the same thickness could be made, so far as the experience of safe makers extended at the time it was sold, it would not have resisted the attack of the burglars who broke it open, taking into consideration the favourable circumstances under which they worked, and the means at their command.

The warranties given, however, have been broken, as I have pointed out, and the question is as to the amount of damages recoverable. I find that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of those defects was not the reason why the burglars were enabled to break it open, and the result would not have been different had the defects been absent.

The ordinary rule as to damages where an article supplied with a warranty that it is of a particular character or fit for a particular purpose, proves to be of a different character or unfit for the purpose for which it is supplied, is that the purchaser is entitled to the difference in value between the article supplied and one which would have complied with the warranty. That rule is easily applied where the article actually supplied and that which should have been supplied have each some commercial value. In the present case it is difficult to apply it; the plaintiff needed a door which should afford reasonable protection against burglars, and the defendants supplied a door which they warranted would give that protection. Being



applied to the purpose for which it was intended, it was found not to comply with the warranty, and was rendered practically valueless. The defect was a concealed one, and under ordinary circumstances was only discoverable by a test which would destroy it. The defendant Thomas West in his evidence says that the door would not be called burglar proof without the chilled steel plate, which this door was warranted to contain and did not contain. The plaintiff, therefore, did not get that which he paid for and which the defendants warranted he should get; what they gave him in its place has become useless and valueless while being put to the use for which it was intended. It is not, therefore, the case of a partial loss, as it would have been had it been a mere case of a difference in commercial value, but that of a total loss, like that of the broken carriage pole in *Randall v. Newson* (1877), 2 Q.B.D. 102.

The plaintiff is entitled, in my opinion, therefore, to recover as damages the price, \$250, which he paid to the defendants for the door in question, and the costs of the action.

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## [DIVISIONAL COURT.]

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*Life Insurance—Friendly Society—Altering Beneficiary—Privileged Beneficiary—Statutory Restrictions—Paramount Authority of Insurance Act—R. S. O. 1897, c. 203, s. 151.*

The designation of a beneficiary in an Ontario contract of insurance can be revoked, and the benefit diverted to another, only within the limits laid down by the Ontario Insurance Act, R.S.O. 1897, c. 203, s. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reserved, and to the by-laws of the insurers, which by-laws permit the desired change. Thus in such a case the attempted diversion of the benefit from a beneficiary of a privileged class to a beneficiary not belonging to that class was *held* invalid by reason of subs. 3 of sec. 151 of the Act.

THIS was an action to determine the ownership of monies paid into Court by the Independent Order of Foresters under a benefit certificate issued by them on February 27th, 1899, being in fact a policy of insurance upon the life of John Henry Lints for \$2,000. In the application for this benefit certificate, which was expressly made part of it, and was dated December 28th, 1898, the applicant, John Henry Lints, designated his mother, Sarah Lints, as his beneficiary, adding, however, the following qualification: "reserving to myself the power of revocation and substitution of other beneficiaries in accordance with the constitution and laws of the Order." By the terms of the certificate the benefit was payable at the death of John Henry Lints "to the widow or other beneficiary or trustee duly designated by the said Brother," John Henry Lints.

When this certificate was issued John Henry Lints was a married man and his wife, the present plaintiff, Serena Lints, was living. He was, however, living apart from her at the time, she being in the county of Elgin and he in the Muskoka district.

On August 23rd, 1899, he went through a form of marriage at Muskoka with the defendant, Fanny Hawn, who was not aware that he was a married man and he lived with her as his wife until the time of his death, which happened on March 8th, 1902.

On November 26th, 1900, after the second ceremony of marriage he made an application under the rules of the Order to the Supreme Court of the Order for leave to change the beneficiary from his *mother*, Sarah Lints, to his *wife*, Fannie Lints. This application was certified to by the officers of the Local Court of the Order in Muskoka and forwarded by them to the officers of the Supreme Court, and the change of beneficiary to Fannie Lints described as the wife of John Henry Lints was duly certified by the Supreme Chief Ranger as having been made in accordance with the constitution and rules of the Order, and the certificate was ordered to be attached to and declared to be a part of the benefit certificate.

After the death of John Henry Lints his mother, Sarah Lints, assigned to the present plaintiff, Serena Lints, all her rights under the benefit certificate. The money was claimed both by Serena Lints and Fannie Lints, the latter being the defendant, Fannie Lints, and making her claim in that name. The money claimed (\$2,000) was paid into Court by the Independent Order of Foresters on October 1st, 1902, and the present action is brought to try the rights of the two claimants.

It was tried before Ferguson, J., at Toronto, on March 4th, 1903, and judgment was given by him in favour of the plaintiff.

The defendant appealed from this judgment, and the appeal was argued on June 4th, 1903, before FALCONBRIDGE, C.J.K.B., and STREET, and BRITTON, JJ.

*R. U. Macpherson*, for the defendant, contended that where the insured reserves a right of revocation, as here, the beneficiary takes only a contingent interest, and the insured and Society together can designate a new beneficiary: Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, sub-sec. 3; that the intention of the insured is what must govern: *ib.* sec. 159, sub-sec. 1; *In re Seyton*, *Seyton v. Satterthwaite* (1887) 34 Ch. D. 514; Porter on Insurance, 3rd ed., p. 352; Joyce on Insurance, §. 731; *In re Browne's Policy*, *Browne v. Browne* [1903] 1 Ch. 190; that the Act does not require the trust to be irrevocable: *McKibbin v. Feegan* (1894), 21 A.R.

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87; that a man might make a designation limited in time, or subject to power of appointment, and that here the designation of the beneficiary was limited by the power of revocation: *Hutchings v. Miner* (1872), 46 N.Y. 456; *Joyce on Insurance*, §740; that in fact this insurance was not within the Act at all: R.S.O. 1897, ch. 203, sec. 151, sub-sec. 5; *Book v. Book* (1901), 1 O.R. 86; *Kreh v. Moses* (1892), 22 O.R. 307, especially at p. 309.

*J. J. Warren*, and *C. F. Maxwell*, for the plaintiff, contended that the Insurance Act must govern: *Fisher v. Fisher* (1898), 25 A.R. 108; *Gillie v. Young* (1901), 1 O.L.R. 368; *Re Harrison* (1900), 31 O.R. 314; *Mingeaud v. Packer* (1892), 21 O.R. 267, 19 A.R. 290; that a designated beneficiary can only be displaced in accordance with the statute, and when a preferred beneficiary is designated, an irrevocable trust is declared in favour of the class; and even under the terms of the Order, Fanny Lints, not being of the preferred beneficiary class could not be substituted for the mother.

*Macpherson*, in reply, contended that *Fisher v. Fisher* was distinguishable, because there there was an absolute designation of the wife as beneficiary; and that the Insurance Act especially says on its face that it is not intended to cover all classes of insurance.

June 27. The judgment of the Court was delivered by STREET, J. [After first stating the facts as above]:—It has been well established in this Province that the provision in our Insurance Act which restricts the substitution of one beneficiary under a policy for another overrides any larger powers of substitution contained in the by-laws of the society granting the policy: *Mingeaud v. Packer*, 21 O.R. 267; in appeal, 19 A.R. 290.

In *Re Harrison*, 31 O.R. 314, it was further held that even where the original designation of a beneficiary was expressly declared to be subject to the by-laws of the society which in effect made the designation revocable, the power to revoke the designation and to divert the benefit to another could be exercised only within the limits laid down by the statute.

In the present case the original designation of the mother of the assured as the beneficiary was made by an instrument



in writing in which an unlimited power to revoke and divert, subject to the by-laws of the society was expressly reserved, and it is contended that this express reservation of the right to revoke on the face of the instrument itself distinguishes the case from those above referred to. The original beneficiary in the present case, the mother of the assured, belongs to the class called "privileged" beneficiaries. Sub-sec. 3 of sec. 151 of R.S.O., ch. 203, forbids the diversion of a benefit from a beneficiary of the privileged class to the beneficiary not belonging to that class; the by-laws of the Independent Order of Foresters, on the contrary, permit the diversion of a benefit to a person who is not within the class defined by the Act as privileged. The defendant here, to whom the defendant has sought to divert the benefit, although described as his wife, is not in reality his wife, and claims to take as a "dependent;" a wife is within the privileged class; a dependent is not. The defendant, therefore, cannot take if the statute is to govern.

In my opinion the case is concluded by the rule laid down in *Re Harrison*, 31 O.R. 314.

The reservation on the face of the instrument by which the original designation was made, of the right to revoke the designation and divert the benefit to another, is no stronger as a matter of legal construction than where the original designation is declared on its face to be subject to by-laws which give the same rights. The statute has been declared to override the by-laws in the latter case, and it must, therefore, do so in the former. The attempt of the assured to divert the benefit from his mother to the defendant, who was not his wife, but merely a dependent, not within the privileged class being contrary to the statute, availed nothing, and the mother was at the time of his death the only beneficiary. The plaintiff, as assignee of the rights of the mother is, therefore, entitled to the proceeds of the certificate now in Court.

The appeal must be dismissed with costs.

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## [DIVISIONAL COURT.]

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REX V. CASE.

*Mandamus—Police Magistrate—Sentence—Ontario Liquor Act, 1902—Voting on  
—Personation—Information—Deputy Returning Officer—Prosecutor—Applicant for Mandamus—Status.*

At the voting upon the Ontario Liquor Act, 1902, the defendant presented himself at a polling place and asked for a ballot in the name of another person, whereupon, before the defendant had left the polling place, one S. laid an information before the deputy returning officer charging the defendant with personation, and on this information the deputy issued his warrant, under which the defendant was arrested and brought before a police magistrate. The deputy then laid an information against the defendant for personation, and the defendant was tried by the magistrate, convicted, and sentenced:—

*Held*, affirming the decision of BRITTON, J., in the Weekly Court, that, having regard to the provisions of R.S.O. 1897, ch. 10 (made applicable by subsec. (5) of sec. 91 of the Ontario Liquor Act, 1902), the information which gave the magistrate jurisdiction was that laid by S.; and the deputy returning officer had no status to apply for a mandamus to the magistrate to impose a different sentence.

*Per* BRITTON, J., that a mandamus could not be granted for that purpose.

AN application by E. J. Ritchie (prosecutor) for a mandamus to compel the police magistrate for the city of Toronto to impose upon Adam S. Case the sentence prescribed by sec. 167 of the Ontario Election Act. The facts are stated in the judgments.

The motion was heard by BRITTON, J., in the Weekly Court, on the 4th February, 1903.

*Alexander Mills* and *W. E. Raney*, for the applicant.

*James Haverson*, K.C., and *T. C. Robinette*, K.C., for Case.

*J. W. Curry*, K.C., for the police magistrate.

February 23. BRITTON, J.:—On the 4th December, 1902, E. J. Ritchie was deputy returning officer at polling subdivision No. 45 in ward 6 of the riding of West Toronto in connection with the Referendum vote, that is to say, the vote taken on the Ontario Liquor Act, 1902. The defendant, Adam S. Case, appeared at the poll and told the poll clerk his name was James Brophy of 142 Dowling avenue. A scrutineer objected,

saying that the defendant was not James Brophy. The defendant insisted that he was. The oath was then read over to the defendant, and he refused to take it. The scrutineer, Sturgeon Stewart, insisted that the defendant was not James Brophy, and thereupon the defendant said his name was Andrew E. Taylor. Stewart then laid an information before the deputy returning officer against the defendant, by the name of Andrew E. Taylor, for the offence of personation contrary to the Liquor Act, 1902. This information was sworn before the deputy returning officer, who issued his warrant, and the defendant was arrested. On the next day Mr. Ritchie, the deputy returning officer, appeared before the police magistrate and laid an information against the defendant, by the name of Andrew E. Taylor, charging that Andrew E. Taylor did attempt to personate James Brophy by applying for a ballot paper, etc. The hearing was adjourned to the 12th December and then to the 19th December. On that day the information was amended, but only by adding the defendant's name, Adam S. Case. The information was re-sworn and the trial proceeded. After the evidence was all taken there was a remand to the 26th December, when the defendant was convicted and fined \$50 and costs or six months in gaol at hard labour.

The formal conviction is for the offence of personation contrary to the Liquor Act, 1902, in that the defendant applied for a ballot paper in the name of James Brophy of No. 142 Dowling avenue. Apparently no objection was taken, even if any objection could be taken, on the ground of the defective information before the police magistrate.

The prosecutor says that the magistrate should have imposed the penalty of \$400 and imprisonment for one year, and he asks that a mandamus issue compelling the police magistrate to do now what it is alleged he should have done on the 26th December, 1902.

This is an application for what was called the prerogative writ of mandamus, and the right to grant such in a proper case is not affected by the Judicature Act, nor by the Rules, except that by Rule 1080 no writ shall issue, but the judgment or order shall have the same effect as a writ of mandamus formerly had.

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Assuming that I have the power to grant what is asked upon the application of the prosecutor, and that he is properly before the Court, is this a case in which a mandamus should go? No case has been cited, nor have I been able to find any, where a mandamus issued to recall a sentence already passed and to impose another, but the want of a precedent would not stand in my way if I were convinced that a mandamus should be granted. This is not an application to compel an inferior court to act, or to hear, or to determine; the police magistrate has already done all this. There is no suggestion of bad faith or improper motive. He has put an interpretation upon the statutes under which he was acting. It is said that the police magistrate erred, and this Court is asked to interpret the law and to compel him to take up the case again and pass another sentence.

None of the Canadian cases to which I have been referred\* seems to me to be of the slightest assistance in enabling me to determine the point under consideration. I find in Shortt on Informations, p. 250, "Mandamus is not granted to undo an act already done. The Court will not allow the validity of the act done to be tried in this way." The Court has always refused to allow an application for a mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful question of law.

If the duty of the police magistrate in passing sentence is of a judicial character, mandamus will be granted, if at all, only where there is a refusal to perform the duty in any way; not where it is done, although, as contended here, erroneously done. The applicant contends that passing sentence is not judicial, but only ministerial. If the magistrate has any discretion as to the sentence, it is judicial, and mandamus should not be granted. Whether he has or not, depends upon the construction of the statutes. I venture the opinion that passing sentence by the Court upon an offender properly convicted is judicial, even where there is only a definite and particular penalty prescribed.

\* See the cases cited before the Divisional Court, *post*.



"The decision, however erroneous, of the proper officer or tribunal, on a matter within his or its jurisdiction cannot be called in question by mandamus:" Shortt, p. 263.

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In *The Queen v. Eastern Counties R.W. Co.* (1839), 10 A. & E. 531, 547, Lord Denman said: "The interference of the Court by mandamus is occasioned by inferior courts or persons refusing to proceed in some course prescribed by law, and not in consequence of any misapprehension or error in that course, provided they have entered upon it."

*The King v. Hewes* (1835), 3 A. & E. 725, 731, decides that a mandamus may go to an inferior court compelling it to act, to do its duty, but not to do a particular thing.

"The province of the writ (of mandamus), in so far as it affects the action of inferior courts, is not to be extended for the purpose of compelling such courts to render a particular judgment in accordance with the views of the higher court:" High on Extraordinary Remedies, 3rd ed., sec. 149; and see the following sections in ch. 30.

"The quashing of a rate being a judicial act (under a local statute), this Court could not order them (the defendants) by mandamus to perform it:" *The Queen v. Justices of Middlesex* (1839), 9 A. & E. 540, per Littledale and Coleridge, JJ.

See also Wood on Mandamus, p. 21—"The writ of mandamus cannot be awarded for the correction of judicial errors."

On the argument it was stated that there is no appeal in the ordinary way by the prosecutor. Then, this is virtually an appeal by him. The magistrate has not asked for the opinion of the Court; the Crown is not moving in the matter; the accused is not asking to quash the conviction because of the excess of jurisdiction, if I may call it excess, in imposing a penalty less than the penalty which the applicant says should have been imposed.

*Whitehead v. The Queen* (1845), 7 Q.B. 582, was cited, and that case decides that a sentence for less than the minimum is as bad as one for more than the maximum, but that was brought up by writ of error.

The police magistrate had under consideration a good deal of law.

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Section 91 of the Liquor Act of 1902 is in part as follows :—  
Sub-section (1) “ All the provisions of the Ontario Election Act and amendments thereto relating to the prevention and punishment of corrupt practices and other illegal acts at elections and contained in sections 159 to 170 inclusive, and in sections 181 to 186 inclusive, and in sections 190 to 196 inclusive, of the said Act and amendments thereto, shall *mutatis mutandis* apply to the taking of the vote upon the said question, in accordance with the provision of this part of this Act.”

Sub-section (2) in part :—“ The penalties imposed for a contravention of any of the provisions mentioned in the preceding sub-section . . . shall be recovered in the same manner as penalties for the like offences are recoverable under the Ontario Election Act, and the procedure thereon shall be the same as nearly as may be . . . .”

Sub-section (5) :—“ The Act to secure the prompt punishment of persons guilty of personation at the election of a member to serve in the Legislative Assembly shall *mutatis mutandis* apply to the taking of the vote under this part in the same manner and to the same extent as at elections to the Legislative Assembly.”

This last mentioned Act is R.S.O. 1897, ch. 10. Under this Act the accused, as an alleged personator, was arrested and brought before the police magistrate. Section 2 of that Act provides that if the person be found guilty, the punishment or penalty imposed by law may be imposed or recovered in a summary manner, and that the police magistrate can proceed with the case under R.S.O. 1897, ch. 90. Section 2 of this last mentioned Act refers to the Criminal Code, as the magistrate's duties and procedure are to be the same as if the penalty or punishment had been imposed by a statute of Canada.

Section 167 of the Election Act, as amended, provides that a personator incurs a penalty of \$400, and shall on conviction be imprisoned for one year.

Section 169, which is equally in force, provides that if for this same offence of personation, a person is tried by a jury and found guilty, his imprisonment shall not exceed six months, and his fine shall not exceed \$200, and that this prosecution

shall be a bar to any proceedings for the recovery of the penalty mentioned in sec. 167.

By sub-sec. (4) of sec. 91 of the Liquor Act of 1902 a county Judge may be selected to conduct the trial of persons accused, and if that is done, "the procedure thereon shall be the same as nearly as may be as on the trial of illegal acts under section 188 of the Ontario Election Act and amendments thereto." There are 16 sub-sections to sec. 188.

By sec. 195 of the Election Act, a distinct mode is provided by which pecuniary penalties may be recovered. The money penalty in this case is incurred by the offence; the liability to imprisonment arises on conviction. If a penalty is recovered under sec. 195, apparently it all goes to the person who may recover by suit.

Under sec. 188 all moneys recovered by a private prosecutor shall belong one-half to the Crown and the other half to the prosecutor: sub-sec. (16.)

It need not occasion surprise if the police magistrate found some difficulty in dealing with the law. He considered the case, and in passing sentence acted upon the law as he understood it.

In the face of this legislation and at the instance of the prosecutor, I am asked to command the magistrate to call back and cancel the sentence of 26th December, and to look only to sec. 167 of the Election Act, and, under that, impose a pecuniary penalty of \$400 and imprisonment for one year. This I ought not to do.

On another ground, which was not mentioned on the argument, I think the mandamus should be refused. As I have stated, R.S.O. 1897, ch. 10, provides that the punishment or penalty imposed by law may be imposed or recovered in a summary manner under R.S.O. 1897, ch. 90. Under this last Act the defendant has the right of appeal to the general sessions, but this appeal may be taken only after notice of appeal, which must be given within ten days after the conviction. This conviction was made on the 26th December, 1902.

I cannot command the police magistrate to open the conviction and re-consider or re-convict. That is unquestionably

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a judicial act, and as to that no complaint is made by any one. If the penalty is now changed, the defendant may be deprived of his right of appeal. The defendant's rights must be considered. He might well say that, as to the more severe penalty, he would appeal. I do not think the Court can change the conviction on this application—practically make a new conviction as to date. There is no provision for doing, on such an application, what can be done on an appeal, or on a motion to quash. In either of such cases any change in the conviction, even to the making of a new one, might, if warranted by the facts and law, be made by the Court. Nor do I think there is any power, on this application, to extend the time for appealing. If not, unless it can be held that the time for appeal would begin to run only from the date of the new sentence, the defendant would be deprived of a substantial right given to him by law, if mandamus were granted as asked.

Certain sections of the Criminal Code are, by ch. 13 1 Edw. VII. and ch. 12 2 Edw. VII. (O.), made applicable to convictions, etc., under Ontario statutes. These do not seem to me to assist. Section 889 of the Code has special reference to motions to quash convictions, and specially deals with applications by the defendant. The power to amend is so largely given in order to prevent a conviction from being held to be invalid; it was never intended that these sections should be invoked by the prosecutor as against the defendant in an effort to have a new conviction made out and a new sentence passed by another Court, especially on an application merely by a mandamus. And further, I do not think the words of these sections would warrant the Court in making a new conviction.

If, by any possibility, the motion could be treated as an appeal by the prosecutor, he should be barred by his laches. The conviction was on the 26th December, 1902, and no notice was given to the magistrate of an intention to make an application to this Court until the 17th January, 1903.

Motion refused without costs.

E. J. Ritchie, the prosecutor, appealed from this decision, and his appeal was heard by a Divisional Court composed of



BOYD, C., FERGUSON and MACMAHON, JJ., on the 9th June, 1903.

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*Alexander Mills*, for the appellant. The penalty is imposed by sec. 167 of the Election Act, as amended in 1900. The prosecutor under a Provincial statute has no right of appeal from the conviction or order of a magistrate: *Regina v. Toronto Public School Board* (1900), 31 O.R. 457; *McLellan v. McKinnon* (1882), 1 O.R. 219. Even the defendant has no right of appeal against the sentence, but only against the adjudication of guilt: *Regina v. Southwick* (1892), 21 O.R. 670. Mitigation of a statutory penalty is not within the discretion of the magistrate unless specially authorized. He has no discretion; the duty to impose the statutory penalty is ministerial: *Bouvier's Law Dictionary*, vol. 2, p. 416; *Sweet's Law Dictionary*, p. 529; *Encyclopædia of the Laws of England*, vol. 7, p. 130; *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 17, p. 887; *Paley on Convictions*, 7th ed., p. 218; *Jones v. Williams* (1877), 36 L.T.N.S. 559. The Court will not grant a mandamus on a question of fact, as to which there is a discretion, but that does not apply to error in law: *The People v. County Judge of Clinton* (1856), 13 How. Pr. 277; *The Queen v. Justices of West Riding of Yorkshire* (1862), 2 B. & S. 811; *The King v. Justices of West Riding of Yorkshire* (1833), 5 B. & Ad. 667; *The Queen v. Deputies of Leicester* (1850), 15 Q.B. 671. If mandamus does not lie, the conviction should be removed by certiorari and the proper sentence pronounced by the Court: 2 Edw. VII. ch. 12, sec. 15 (O.); *Criminal Code*, sec. 889; *Regina v. Murdock* (1900), 27 A.R. 443; *Regina v. Beemer* (1888), 15 O.R. 266.

*W. E. Raney*, on the same side. The attempt to reduce the penalty is a mere nullity: *Regina v. Dunning* (1887), 14 O.R. 52, 58. As to what are judicial and what ministerial duties see *Gleason v. Peerless Manufacturing Co.* (1896), 1 N.Y. App. 257; *Grider v. Tally* (1884), 77 Ala. 422; *People v. Court of Sessions of Monroe County* (1892), 8 N.Y. Crim. Rep. 355; *Shortt on Informations*, pp. 263, 295.

*James Haverson*, K.C., for the defendant. The magistrate was right and cannot be corrected. The applicant has no status. He is not the informant. See R.S.O. 1897, ch. 10,

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made applicable by the Ontario Liquor Act of 1902. The magistrate has no jurisdiction under the Election Act, but only under ch. 10. Mandamus will not lie: Shortt on Informations, pp. 250, 258. Only the defendant is entitled to certiorari under the Criminal Code.

*Mills*, in reply, referred to *The King v. Berkley* (1754), 1 Ld. Kenyon 80, 103; *The King v. Boulton* (1836), 4 A. & E. 498, 506.

June 11. The judgment of the Court was delivered by MACMAHON, J.:—In disposing of the appeal against the judgment and order of Mr. Justice Britton refusing a mandamus, it is, we think, unnecessary to consider more than one of the objections urged by counsel for the defendant.

The facts connected with the arrest, trial, and conviction and sentence imposed by the police magistrate, are fully set out in the judgment of Britton, J., and need not be repeated at length.

A summary mode for the trial of persons accused of personation at an election before such person has left the polling place is provided by R.S.O. 1897, ch. 10.

By sec. 4: "If a person against whom it is proposed to lay an information for personation has not left the place for registration or the polling place, the registrar or deputy returning officer may, either on his own motion or at the request of any one proposing forthwith to lay an information against such person, detain or direct the detention of such person until an information can be drawn up."

"5. In case an information is laid charging any person with the offence of personation, as aforesaid, the registrar may on any day during which a sitting for registration is held, or the deputy returning officer may on the polling day, but not afterwards, issue his warrant for the arrest of the person so charged, in order that he may be brought before the police magistrate to answer to the said information and to be further dealt with according to law."

"6. The said warrant shall be sufficient authority for any constable, peace officer or gaoler to detain any such person until he is brought before the magistrate, as aforesaid."

An information was laid by Sturgeon Stewart before the deputy returning officer, S. J. Ritchie, against A. E. Taylor (which was the name given by Case when he asked for a ballot) on the polling day and before the defendant had left the polling place, charging him with personating James Brophy. The deputy returning officer (Ritchie) on this information issued his warrant for the apprehension of Andrew E. Taylor, and the defendant was thereupon apprehended and brought before the police magistrate for the city of Toronto.

On the 5th December, upon the defendant being brought up before the police magistrate for trial, E. J. Ritchie, the deputy returning officer, laid an information against Andrew E. Taylor, for that he, at a polling place therein stated, "did attempt to personate James Brophy by applying for a ballot paper." The information was subsequently amended by adding to the name of Taylor, "or alias Adam S. Case."

The information which gave the magistrate summary jurisdiction to try under the above clauses of R.S.O. 1897, ch. 10, was that laid by Stewart, and without such information and complaint the police magistrate was powerless. Then, Stewart being the informant, he is the only person who could apply for a mandamus, and Ritchie is without any *locus standi* before the Court.

The appeal must be dismissed. We think it is not a case for costs.

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REX V. COULTER.

June 17.

*Criminal Law—Procuring Personation of Voter—Ontario Liquor Act, 1902—Ontario Election Act, 1902, secs. 167, 168—Procuring Person to Vote Knowing that he has no Right.*

The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question :—

*Held*, that the conviction was justified under sec. 168 of the Ontario Election Act, R.S.O. 1897, ch. 9 (made applicable by sec. 91 of the Liquor Act), although the evidence shewed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a voter at such polling place. Section 167 (1) makes the counselling or procuring of personation a corrupt practice, but does not provide a punishment; and sec. 168 is in terms wide enough to cover the offence.

MOTION by the defendant to make absolute a rule nisi quashing his conviction for an offence against sec. 168 of the Ontario Election Act by procuring one Raynor to vote in the name of another person at the voting upon the Ontario Liquor Act, 1902. The facts appear in the judgments.

The motion was heard by a Divisional Court composed of BOYD, C., FERGUSON and MACMAHON, JJ., on the 10th June, 1903.

*J. Haverson*, K.C., for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

June 17. BOYD, C.—The provisions of the Ontario Election Act as to corrupt practices are made to apply to the taking of the vote upon the question, "Are you in favour of bringing into force the Liquor Act, 1902?" (see sec. 91 of 2 Edw. VII. ch. 33 (O.)), in accordance with the provisions of part I. of the Act.

The offence here charged and convicted of is that the defendant did on the 4th December, 1902, induce and procure another person (Raynor) to vote at a polling place in the city of Toronto for the taking of that vote before one Pim, deputy returning officer thereat, the defendant well knowing that



Raynor had no right to vote at the said time and place upon the said question.

The justification for the conviction is under sec. 168 of the Election Act, R.S.O. 1897, ch. 9, by which every person who induces or procures another to vote at an election, knowing that the other has no right to vote thereat, shall be guilty of a corrupt practice.

Reading this *mutatis mutandis*, as directed by sec. 91 of the Act of 1902, it will be, that a person who procures another to vote *upon the said question*, knowing he has no right to vote thereon, shall be guilty, etc.

As I understand the objection, the conviction is argued bad because it is said that Raynor had a right to vote upon the question, though not a right to vote at the particular polling place, and therefore (it is said) this wrong-doing is not hit by the statute.

Examine, however, who has a right to vote upon the question. By the Act of 1902, sec. 3, "the persons *entitled to vote* upon the said question" are all whose names appear in the voters' lists . . . as entitled to vote at a general election . . . and whose names are duly entered in the poll books to be used for the purpose of voting under the Act.

Under sec. 10 different polling places are to be fixed by the returning officer for each subdivision of the municipality, and by sec. 20 a poll book for each subdivision containing the names of all persons *entitled to vote* therein shall be furnished for every polling place.

Section 24 provides for the appointment of a deputy returning officer for each polling subdivision, who is to open and hold the poll and to record in the voters' list in the poll book the particulars relating to electors voting at the polling place, as by the Act directed.

By sec. 36 it is enacted that no person shall be *admitted to vote* unless his name appears on the list in the poll book (*i.e.*, at each subdivision).

Section 38 indicates how the poll books are to be made up by the clerk of the peace, *i.e.*, by entering in the poll book for each subdivision from the proper list of voters the name of

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every person appearing therefrom to be *entitled to vote* within the subdivision for which the said poll book is required.

Section 47: In case the name of a person *entitled to vote* is entered on the list of voters for more than one polling subdivision, he shall only vote at the polling place for the subdivision in which he resides.

These and other like sections indicate that the person entitled to vote upon the question must have his name appear on the voters' list to be used in the particular subdivision where he tenders his vote, and without this he is not entitled to vote and is not to be admitted to vote upon the question.

That is what is struck at by sec. 168, in my opinion; the man who brings forward another, and induces him to vote at a polling place where he has no right to vote, the former knowing that the latter has no such right, is guilty of a corrupt practice. Such is the present case, and the judgment is well founded in law and in fact and should stand affirmed, with costs.

MACMAHON, J.—In accordance with the provisions of sec. 91 of the Ontario Liquor Act, 1902, H. H. Dewart, the county Crown attorney for the county of York, notified Sir John A. Boyd, President of the High Court of Justice for Ontario, that he was informed and believed that personation and certain other corrupt practices and illegal acts set out in a schedule annexed to the notification were committed in the city of Toronto in connection with the voting under part I. of the Liquor Act, 1902, on the 4th day of December, 1902.

On receipt of such notification, Sir John A. Boyd in writing designated His Honour Judge Neil McCrimmon, Judge of the county of Ontario, to conduct the trial of the persons accused, as set forth in the schedule.

One of the corrupt acts mentioned in said schedule was: "2. That John D. Coulter on the fourth day of December in the year of our Lord one thousand nine hundred and two, at the city of Toronto in the county of York, unlawfully did induce and procure another person, to wit, one Robert Raynor, to vote at a polling place held in the said city of Toronto for the taking of the vote upon the question of bringing into force the Liquor Act, 1902, before one George Pim, then and there

acting as deputy returning officer at the said polling place, he, the said John D. Coulter, then well knowing that the said Robert Raynor had no right to vote at the said time and place upon the said question, and that the said John D. Coulter in manner aforesaid was then and there guilty of a corrupt practice, contrary to the said the Liquor Act, 1902, and to the Ontario Election Act, section 168."

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Coulter was tried before Judge McCrimmon, and on the 27th February, 1903, convicted for having on the 4th day of December, 1902, committed the offence as set forth in the said schedule, and was therefore guilty of a corrupt practice contrary to the said Liquor Act, 1902, and to the Ontario Election Act, sec. 168, and for said offence was ordered to pay to H. H. Dewart, county Crown attorney, the sum of \$100 and costs of the prosecution, within thirty days from the 27th February, 1903, and in default of payment to be imprisoned in the common gaol for three months unless the fine and costs were sooner paid.

An order nisi was, upon the return of the certiorari granted herein, obtained by the defendant, calling upon His Honour Judge McCrimmon and the county Crown attorney for the county of York, to shew cause why the conviction should not be quashed, upon the following grounds:

1st. That no offence is disclosed or charged in the said complaint, information, or summons under or upon which the said Coulter was tried, nor does the said order or conviction contain or disclose any offence against the said the Liquor Act, 1902, or the Ontario Election Act.

2nd. That the evidence disclosed and the learned Judge found that the said Coulter induced and procured one Robert Raynor to commit the offence of personation, not the offence of inducing or procuring him to vote knowing that he had no right to vote, but convicted him of the latter offence.

Section 167, sub-sec. 1, of the Ontario Election Act, provides that "Every person who aids or abets, counsels or procures the commission of the offence of personation, shall be deemed guilty of a corrupt practice."

Raynor had personated one Robinson, a voter entitled to vote at the polling division, and was convicted under sub-sec. 2

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of sec. 167, for that offence, the penalty for which is a fine of \$400, and also imprisonment for one year.

Section 168 provides that "Every person who votes at an election knowing he has no right to vote at such election and every person who induces or procures any other person to vote at an election, knowing that such other person has no right to vote at the election, shall be guilty of a corrupt practice, and shall be liable to a penalty of \$100."

Sub-section 2 of sec. 167 is aimed at and provides only for the punishment of the person guilty of personation. And there is no provision whatever in the Act punishing one who abets, counsels, or procures the commission of the offence of personation, unless he can be reached under the provisions of sec. 168.

A person may be guilty of a corrupt practice by inducing another person to vote at an election, if, for instance, he knows that such other person is an alien and he induces him to take the oath that he has been naturalized. Or if he induces a manhood suffrage voter to take the oath required by sec. 98, that he was the person named or intended to be named in the list of voters and that he had resided within Ontario for nine months before the day fixed by law for beginning to make the assessment roll in which such person was entitled to be entered as a person qualified to vote; and that he was in good faith a resident of and domiciled in the municipality in the list of which he was entered, etc., when he knew that such person was not the person named or intended to be named on the list of voters, or that he was not in the Province of Ontario for nine months before such day; or was not at such date a resident of and domiciled in the municipality in the list of which he was entered, etc. See *Haldimand Dominion Election* (1888), 1 Ont. Elec. Cas. 529.

Section 168 of the Act was, we consider, intended to reach and punish not only a person who abets, induces, or procures another person to vote at an election knowing that such other person had no right to vote in his own name, and does so vote, but also to cases where such other person is guilty of personation and votes in the name of the person personated.



If this were not so, he who induces or procures another person to personate a voter entitled to vote and votes in such voter's name, would escape all punishment. Sub-section 1 of sec. 167 must be read into sec. 168.

The offence charged in the information is that the defendant Coulter procured Raynor to vote at a certain polling place in Toronto, having no right to vote, and the evidence is that Coulter did procure Raynor to vote and he did vote in the name of Robinson, and it was for that corrupt practice he was convicted.

The conviction discloses an offence under sec. 168, and must therefore be affirmed, and the order nisi discharged with costs.

FERGUSON, J.—I concur.

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June 22.

## REX V. MYERS.

*Municipal Corporations—By-law — Transient Traders — Conviction—Penalty—Costs—Distress—Imprisonment—Uncertainty—Amendment—“Butcher.”*

Upon motion to quash the conviction of the defendant, a transient trader, for offering meat for sale in quantities less than the quarter carcase, without having paid a license fee, contrary to a by-law of a village:—

*Held*, that it was not necessary that the by-law or conviction should contain the words “for temporary purposes” and “assessment roll for the *then* municipal year,” as they relate to the regulation of transient traders under clause 30 of sec. 583 of the Municipal Act, R.S.O. 1897, ch. 223, which refers to the payment of a license fee before beginning operations; nor was it necessary to refer to or negative the provisions of 58 Vict. ch. 42, sec. 22(O.), making the term “transient trader” applicable to one who has resided less than three months in the municipality before beginning business, the evidence shewing brief visits periodically and regularly to sell meat for a given time at a particular place in the village.

- (2) The objection that the penalty of \$1 was not apportioned under sec. 708 failed, because the application was otherwise provided for by the by-law.
- (3) The objection that the conviction and by-law were in excess of the statute because power of distress was given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, was not well taken, having regard to the powers given by sec. 702, sub-secs. 2 and 3.
- (4) The uncertainty of the offence in the conviction as to date, place, and meat sold, should be cured by amendment, upon the facts in evidence, under 2 Edw. VII. ch. 12, sec. 15 (O.)
- (5) Although secs. 580 and 581 deal specifically with the sale of meat, a transient trader, under sec. 583, might include a butcher or dealer in meat.

On the 5th February, 1903, the defendant was convicted before a justice of the peace for the county of York for that he, the defendant, a transient trader, did, while occupying premises “temporally” in the village of Stouffville, and not being entered upon the assessment roll in said village in respect to income or personal property, offer goods or merchandise for sale, to wit, meat, in quantities less than by the quarter carcase, without having first paid to the corporation of the village of Stouffville the amount required as a license fee for so doing, under the provisions of a by-law of said village, No. 98, said goods or merchandise so offered for sale not being the stock of an insolvent estate; and the defendant was adjudged for his said offence to forfeit and pay the sum of \$1 fine, to be paid and applied according to law, and also to pay to the complainant the sum of \$1.25 for his costs; and if the said several sums were not paid forthwith, on or before the 6th February, the

same were to be levied by distress and sale of the goods and chattels of the defendant, and in default of sufficient distress the defendant was to be imprisoned in the common gaol of the county for the space of ten days, unless the said several sums and all costs and charges of the said distress (and of the commitment or conveying of the defendant to gaol) should be sooner paid.

The by-law referred to in the conviction was passed on the 13th October, 1891. It provided as follows :

1. Every transient trader who occupies premises in the village of Stouffville and is not entered upon the assessment roll in respect to income or personal property, and who may offer goods or merchandise of any description for sale by auction, or in any other manner, conducted by himself or by a licensed auctioneer, or by his agents or otherwise, shall pay, before commencing to trade within the said village, the sum of \$40 by way of license to the said corporation.

2. The sum so paid as license shall be credited to the trader paying the same upon and on account of taxes for the unexpired portion of the then current year, as well as any subsequent taxes, should such trader remain in the said municipality a sufficient time for taxes to become due and payable by him, and in any other event the said sum so paid shall be taken and used by the said corporation as a portion of the license fund of the corporation.

3. This by-law shall not affect . . . the sale of the stock of an insolvent estate . . .

4. Any person convicted of a breach of this by-law shall forfeit and pay, at the discretion of the convicting justice or justices of the peace, a penalty not exceeding the sum of \$50 for each offence, exclusive of costs, and, in default of payment of the said penalty and costs forthwith, the said penalty and costs, or costs only, may be levied by distress and sale of the goods and chattels of the offender, and, in case of there being no distress out of which such penalty and costs, or costs only, can be levied, the convicting justice or justices of the peace may commit the offender to the common gaol of the city of Toronto, with or without hard labour, for any period not exceeding 21 days, unless the said penalty and costs be

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sooner paid, said penalty to be paid by the convicting justice or justices to the treasurer for the use of the said corporation.

5. That any by-law or by-laws conflicting with this by-law shall be and the same are hereby repealed.

A copy of this by-law was produced by the clerk of the municipality of Stouffville upon the hearing of the complaint.

The evidence shewed that the defendant did not live in Stouffville and that his name was not on the assessment roll; that he went to Stouffville once a week and sold meat from a table at Spofford's market in the village; that he also sold meat at Mount Albert and Newmarket; that he sold both wholesale and retail, that is, both by the quarter and in smaller quantities; that he had paid no license fee to the municipality of Stouffville.

The conviction and proceedings having been removed by *certiorari*, *J. W. McCullough*, for the defendant, on the 7th April, 1903, obtained a rule *nisi* to quash the conviction, upon the following grounds:—

1. That the defendant did not come within the by-law at all.

2. That if the defendant was liable to pay a license fee at all, it could only be under sec. 580 or sec. 581 of R.S.O. 1897, ch. 223, but, as no by-law had been passed under either of these sections, the defendant had committed no offence.

3. If a by-law had been passed under sec. 581, the maximum license fee would have been \$25, whereas under sec. 583 it might be \$100.

4. The specific article "meat" being dealt with in secs. 580 and 581, the penalties of another section dealing with "goods and merchandise" generally, could not be invoked.

5. That there was no sufficient proof of any by-law.

6. That the by-law, if proved, was invalid for the following reasons:—(a) It did not state that the occupation was to be "for temporary periods." (b) It did not state that the entry upon the assessment roll was to be "for the then current year." (c) It did not state that the trader "has not resided continuously in such municipality for a period of at least three months next preceding the time of the commencement by him of such business." (d) It did not contain a three months' clause, which has been added to the statute since the by-law was



passed, necessitating a new by-law. (e) It provided that the whole penalty was to be paid to the treasurer for the use of the corporation. (f) It purported to give power to distrain both for penalty and costs, which was in excess of the statute, as was also the imprisonment in case there should not be sufficient distress to satisfy penalty and costs. (g) It fettered the discretion of the magistrate as to sending a defendant to the common gaol, or house of correction, or a lock-up house.

7. That the conviction was bad for the reasons invalidating the by-law, except (d) and (g).

8. That the conviction was bad because it did not state the premises, the date of the offence, the kind of meat sold, or the name of the vendee—all of which would be essential in an indictment.

On the 10th June, 1903, *McCullough* supported the rule, before a Divisional Court composed of BOYD, C., FERGUSON and MACMAHON, JJ., and referred to *Rex v. St. Pierre* (1902), 4 O.L.R. 76; *Regina v. Cuthbert* (1880), 45 U.C.R. 19; *Regina v. Applebe* (1899), 30 O.R. 623; *Regina v. McFarlane* (1897), 33 C.L.J. 119, 17 C.L.T. Occ. N. 29; *Manson v. Hope* (1862), 2 B. & S. 498; *Regina v. Dowsley* (1890), 19 O.R. 622; *Regina v. Smith* (1899), 31 O.R. 224; *Rex v. Swanton* (1903), 2 O.W.R. 106; *Regina v. McMillan* (1901), 12th January, not reported, referred to in *Rex v. Swanton*; *Smith v. Moody*, [1903] 1 K.B. 56; *Regina v. Hart* (1891), 20 O.R. 611; *Regina v. Grant* (1889), 18 O.R. 169.

*W. E. Middleton* and *C. R. Fitch*, for the magistrate and complainant, shewed cause.

June 22. The judgment of the Court was delivered by BOYD, C.:—This conviction is against a transient trader occupying premises in the village, who, not being entered on the assessment roll, offered his goods for sale without having paid the license fee in that behalf imposed by by-law No. 98 of the village of Stouffville. That by-law was passed in the year 1891, pursuant to the provisions of the Municipal Amendment Act of 1888 (51 Vict. ch. 28, sec. 23 (O.)), empowering the municipality to fix a license fee to be paid by such transient

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traders before commencing to trade. That law of 1888 is practically carried into the existing municipal law, as found in R.S.O. 1897, ch. 223, sec. 583, clauses 31 and 33; and the by-law of 1891 is well founded thereon. The objections made as to the non-appearance therein of the words "for temporary purposes" and "assessment roll for the *then* municipal year," are not pertinent, as they relate to the regulation of transient traders under clause 30 of sec. 583. This is under the clause which relates to the payment of a license fee before beginning operations. It does not appear needful to refer to or negative the provisions of a later section—1895, 58 Vict. ch. 42, sec. 22 (O.)—which gives an extensive meaning to the words "transient trader," and makes the term applicable to one who has resided less than three months in the municipality before beginning business. The evidence in the present case shews a residence less than three months, and in fact but brief visits periodically and regularly to sell meat for a given time at a particular place in the village.

On the broad merits, therefore, the conviction is good.

The objection that the penalty of \$1 was not apportioned under sec. 708 fails, because the application is otherwise provided for by the by-law on which the conviction proceeds.

The objection that the conviction and by-law are in excess of the statute because power of distress is given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, is not well taken. Power is given by sec. 702, sub-sec. 2, to pass by-laws for collecting penalties and costs by distress, and by sub-sec. 3 to punish by imprisonment after no distress or ineffective distress.

The objection as to the uncertainty of the offence in the conviction as to date, place, and meat sold may be met by amendment from the facts in evidence under the authority of 2 Edw. VII. ch. 12, sec. 15 (O.)

The large question is taken in the notice of motion, but was not pressed so much as the other points already dealt with, viz., that this defendant as "butcher" does not come within the purview of the "transient traders" section at all; and that the proper section under which his case should be dealt with is sec. 580 or 581 of ch. 223.

Section 580 (5) provides for the regulation of the place and manner of selling meat, and sec. 581 (1) for licensing and regulating the sale of fresh meat by retail. These do, no doubt, refer specifically to *meat*, but it is under a heading and with a collocation of subjects, in the scheme of the Municipal Act, which betokens making general provision for the disposal of commodities at fairs or in public markets.

The broad classification under which these sections fall is division XVII., "Fairs and Markets," and the municipality may enact laws to localize the sale of all sorts of meat, miscellaneous products and things, in markets or other fixed places. But the section under which this by-law is framed is under a different heading, viz., division XVIII., "Regulation of Trade," which also deals with a strange medley of subjects in the sub-headings, such as bread and bill-posters; bagatelle and ferries; auctioneers and tobacconists; runners and milk dealers; plumbers and hawkers; transient traders and victualling houses. Now, a man may be a hawker of potatoes, fruits, and vegetables (commodities dealt with specifically under division XVII.): *Howard v. Lupton* (1875), L.R. 10 Q.B. 598, 600; and a "transient trader" may be a person who follows the trade of a butcher: *Doe d. Gaskell v. Spry* (1818), 1 B. & Ald. 617; and in Dr. Murray's Oxford Dictionary, *sub voce*, it is said "one whose trade is the slaughtering of large tame animals for food; one who kills such animals and sells their flesh; in mod. use it sometimes denotes a tradesman who merely deals in meat."

The rule should be discharged with costs.

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## McMILLAN v. ORILLIA EXPORT LUMBER CO.

June 20.

*Chose in Action—Assignment of—Notice to Debtor—Judicature Act—Sufficiency of Notice—R.S.O. 1897, ch. 51, sec. 58, sub-sec. 5.*

A creditor of the defendants to whom they owed \$184.93, being \$124.80 for oak lumber, and \$60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice, however, which the defendants had of this assignment was in a letter from the plaintiff stating that he had an order from the creditor for the amount due in respect to a purchase of "oak lumber" bought by the defendants' agent. The plaintiffs drew on the defendants for the whole amount, who refused to accept the draft on the ground that they had no order from their vendor to do so. Thereupon the present action was brought:—

*Held*, that though there was sufficient to put the defendants upon enquiry in the notice they received, yet it was not sufficiently clear and express to entitle the plaintiff to sue in his own name without making the assignor a party, under the section of the Judicature Act relating to assignments of choses in action.

THIS was an action for money alleged by the plaintiff to be due to him from the defendants under the circumstances mentioned in the judgment, and which was tried before STREET, J., at Sault Ste. Marie.

*F. E. Titus*, for the plaintiff.

*R. D. Gunn*, for the defendants.

No cases were referred to on the argument.

June 20. STREET, J.:—This action and a counterclaim of the defendants' were tried before me at Sault Ste. Marie on December 22nd, 1902.

After hearing the evidence I dismissed the counterclaim and all of the plaintiff's claim, excepting his claim of \$184.93, being a sum of money owing by the defendants to one James Hurdle, which the plaintiff alleged had been duly assigned by Hurdle to him. I reserved the consideration of this claim.

The facts with regard to it were proved or admitted by counsel at the trial as follows:—

One Hollway was an inspector and salesman for the defendants, and before July 22nd, 1902, he had purchased from Hurdle a quantity of timber for the defendants, and they were indebted to Hurdle in the sum of \$184.93 for it.



On July 22nd, 1902, Hurdle made out his account against the defendants in detail, and at the foot of it signed the following order: "Messrs. Orillia Export Lumber Co. Pay to order of J. H. McMillan above amount, one hundred and eighty-four dollars and ninety-three cents."

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The plaintiff then, a few days afterwards, drew on the defendants for the full amount of his claim in the present action \$541.46, including the Hurdle claim. This draft was presented to the defendants on August 1st, 1902, and they wrote on the same day to the plaintiff to say that they could not reconcile the amount with their figures, and to ask for a detailed statement. The plaintiff sent them the statement of his claim of \$541.46, part of it being as follows:—

"To amount of James Hurdle order for lumber bought by Hollway, \$184.93."

The statement was enclosed in a letter from the plaintiff to the defendants, dated August 7th, 1902, in which the plaintiff says: "I am in receipt of your favor of recent date, and in reply beg to say that I attached a copy of account to draft and also an order which I had from James Hurdle, from whom Mr. Hollway bought oak lumber to the amount of order given me . . . I am herewith enclosing a copy of account, for which I trust you can accept draft which has been returned for acceptance by your request."

It appears from the detailed account of Hurdle against the defendants, below which the order signed by him is written, that only \$124.80 of the amount is for oak lumber and the remaining \$60.13 making up the \$184.93 is for basswood lumber.

I think it is clear from the evidence that if Hurdle's order were ever attached to the draft for \$541.46 presented to the defendants it was not so attached at the time the draft was presented, and the only notice to the defendants of its existence was the mention of it in the account which the defendants received from the plaintiff in his letter of August 7th, 1902, and the reference to it in that letter, as quoted above.

The plaintiff's draft was again presented to the defendants on August 15th, 1902, and was again refused: they wrote to

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the plaintiff on that day giving reasons for their refusal. The reason given by them, so far as it relates to their part of the claim, is thus stated: "You charge us with \$184.93 for Hurdle's lumber. We have no order from Hurdle to pay you that." The plaintiff appears to have written a further letter to the defendants on August 22nd, 1902, and to have again sent back the draft for the defendant's acceptance, but his letter is not produced or proved, and there is nothing to shew its contents, and the draft was again refused. The present action was begun on August 29th, 1902. After it was begun the defendants paid \$184.93 into the Dominion Bank at Orillia, where they carry on business, to Hurdle's credit, but with the proviso that it should not be paid out to him without the consent of the plaintiff. This money still remains in the bank upon these terms.

I think the order given by Hurdle to the plaintiff amounts to an assignment of his claim against the defendants. It is not a mere order to the defendants to pay to the plaintiff or his order a sum of money and to charge it to the account of the drawer: such an order would have been a bill of exchange and not an assignment. But it is an order to pay to the plaintiff a particular specified debt owing by the defendants to the drawer, it is strictly equivalent to a direction from Hurdle to the defendants to pay the plaintiff the sum due by the defendants to Hurdle for the oak and basswood lumber, and is therefore an assignment of that sum: *Hall v. Prittie*, (1890) 17 A.R. 306.

Prior to the statutes enabling the assignee of a chose in action to bring an action upon it in his own name it was necessary that the assignor, the original creditor, should be joined as a party because of the common law rule which refused to recognize the assignment of choses in action. Under the Judicature Act the assignee holding an absolute assignment in writing, *having first given express notice* in writing to the debtor of such assignment, is entitled to sue the debtor without making the assignor a party; R.S.O. 1897, c. 51, s. 5.

The plaintiff in the present action has brought his action for this claim, along with other claims, upon dealings directly occurring between him and the defendants, and he has not joined the assignor Hurdle as a party.

The question is whether he had before action given express notice in writing to the defendants, so as to give himself the right to sue without joining Hurdle as a party.

It is not difficult to conceive that a debtor may often find himself in a position of some difficulty under the provision of the Judicature Act, which is here invoked by the plaintiff, and the case before us presents an example of this.

The plaintiff lives at Gore Bay, the defendants at Orillia, and the original debtor, Hurdle, at a distance from both the plaintiff and defendants. The defendants on August 7th, 1902, received from the plaintiff an account current containing the entry "To amount of James Hurdle order for lumber bought by Hollway, \$184.93." This account was enclosed in a letter in which he tells the defendants that he had attached to a draft which they had refused an order from James Hurdle, from whom Mr. Hollway bought *oak* lumber to the amount of the order given. No such order ever had been or ever was seen by the defendants down to the time of this action. I say the defendants were placed in a position of some difficulty; they knew they owed Hurdle money; they were willing to pay it to him or his assignee upon being assured that the assignee was entitled, but they did not wish to run the risk of paying it twice, and they very naturally answered, "You charge us with \$184.93 for Hurdle's lumber: we have no order from Hurdle to pay you that," and then this action is brought by the plaintiff without any further attempt by the plaintiff to satisfy the defendants that he had such an order.

It does not appear to be necessary under the statute that the order, or even a copy of it, should be exhibited to the debtor to entitle the assignee to sue, but I think he should be held to a strict performance of that which the statute does require him to do, namely, to give to the debtor express notice in writing of the assignment. It is not, I apprehend, enough that the debtor should have notice sufficient merely to put him upon enquiry and to prevent his paying the original creditor without further enquiry. To enable the assignee to sue alone the notice must be express notice, and it must be in writing; there should be nothing equivocal about it, nothing to leave the debtor in doubt

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as to whether the whole debt or only part of it had been absolutely assigned. I think the notice in the present case falls short of these requirements. The plaintiff, as part of the notice, tells the debtor that the order is for *the amount* of the "oak lumber" bought by the defendants' agent, Hollway, from Hurdle, and he mentions \$184.93 as the amount. It is undisputed, however, that the amount of the oak lumber in question was only \$124.80. The defendants might well doubt whether the plaintiff was assignee of this \$124.80 only, or of the additional \$60.13 for basswood lumber as well. Their reply does not waive or admit anything; they simply say, "We have no order from Hurdle to pay you what we owe him."

There was sufficient, in my opinion, to put the defendants upon enquiry in the notice they received, but it was not sufficiently clear and express to entitle the plaintiff to sue under the statute, because the notice was ambiguous enough to have justified them in asking the plaintiff whether the assignment covered the oak alone or the basswood as well as the oak.

I think, therefore, that this part of the action must also be dismissed, but without prejudice to the right of the plaintiff to bring another action to recover the amount.

Two actions were brought upon the different causes of action which have been considered at the trial and in the present judgment. These actions were both begun on the same day by the plaintiff against the defendants in the District Court of Manitoulin. After issue joined these actions, upon the defendants' application, were consolidated and removed into the High Court by an order of my brother Britton, and ordered to be tried at Sault Ste. Marie, the defendants agreeing to pay the additional witness fees incurred by the change of venue from Gore Bay. One of the actions thus consolidated related only to the Hurdle debt, the other related to the other part of the plaintiff's claim, and the defendants counterclaimed in it.

The result is that all the plaintiff's causes of action and the counterclaim are dismissed.

I think the defendants should recover their costs of defence as if the only action had been one upon the Hurdle claim, and these costs are to be taxed upon the District Court scale; the costs of the motion in Chambers should also be taxed to them



on the High Court scale; their witness fees should be no greater than if the action had been tried at Gore Bay, and the plaintiffs may set off the amount of the increased expense of taking their witnesses to Sault Ste. Marie instead of to Gore Bay. No order as to the costs of the other causes of action or the counterclaim.

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## [IN THE COURT OF APPEAL.]

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June 29.

## REX v. LEWIS.

*Criminal Law—Necessaries—Medical Treatment — Christian Science — Evidence of Bona Fides—Criminal Code, secs. 209, 210—55-56 Vict. ch. 29 (D.).*

The word “necessaries” in sec. 209 of the Criminal Code—which enacts that every one who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessities of life,—includes proper medical aid, assistance, care and treatment.

And, therefore, where the jury found that the prisoner, a Christian Scientist, had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age, when it was reasonable and proper that such treatment should be provided, and that the child died from such neglect :—

*Held*, that the defendant had been guilty of an indictable offence under section 210 of the Code, which enacts that every one who as parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under sixteen, is criminally responsible for omitting without lawful excuse so to do.

*Held*, also, that evidence of cures effected by Christian Science treatment was not admissible.

The law of the land must be obeyed even though there be something in the shape of belief in the conscience of the person coming under its obligation, which would lead him to obey what in his state of mind, he may consider a higher power or authority.

*Semble*, medical aid, assistance, and treatment by some one other than a legally qualified physician or practitioner belonging to one of the recognized schools of medicine, may in some cases, satisfy the requirements of the Code.

THIS was a Crown Case reserved by FALCONBRIDGE, C.J.K.B., as follows :—

The prisoner was tried before me as Judge at the sittings of Oyer and Terminer and General Gaol Delivery for the county of York, with a jury, on the second, fourth and fifth days of November, A.D. 1901, upon the following indictment :—

The jurors for our Lord the King present that James Henry Lewis at the city of Toronto, in the county of York, in the month of August, in the year of our Lord one thousand nine hundred and one, being the parent of a certain child named Roy Lewis, and being as such parent under a legal duty to provide necessaries for the said Roy Lewis, his child, then under the age of sixteen years, and a member of the household of him, the said James Henry Lewis, did then and there unlawfully and without lawful excuse omit to provide neces-

sary medical treatment, medicines and assistants, and other necessities for the said Roy Lewis, his child, whereby the death of the said Roy Lewis, his child, was caused at the city of Toronto, on the thirteenth day of August, in the year aforesaid.

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And so the jurors aforesaid do say that the said James Henry Lewis at the city of Toronto aforesaid, on the day and year last aforesaid, in manner aforesaid, did unlawfully commit the indictable offence of manslaughter, contrary to the Criminal Code.

The prisoner was convicted on the above indictment and I reserved sentence, allowing the prisoner his liberty on his own bail, pending the decision of the Court of Appeal upon the case hereby reserved.

The prisoner is a member of a religious body known as the Church of Christ, Scientist, of which an essential belief is that God heals the sick as well as the sinful, and resort is had to prayer to God, by which is meant silent communion with God the Divine Spirit, with the full faith and understanding of His omnipotence omniscience and omnipresence, of His willingness and ability to heal sicknesses of every kind, as set forth with particularity in the text book of the movement, "Science and Health, with Key to the Scriptures," by Mrs. Mary Baker G. Eddy, the discoverer and founder of Christian Science.

The objection was raised to my charge to the jury that the evidence of the defence proving what Christian Science is by its works, and its efficacy through prayer as compared with medical treatment and material medicines, should not have been excluded, nor should I have charged that medical treatment and medicines were necessities under the purview of said section 210, sub-sec. 1 of the Criminal Code, 55-56 Vict., c. 29.\*

In my charge to the jury I said:—

"The law of the land is paramount, therefore the evidence you listened to yesterday (referring to the evidence of the

\* Section 210, sub-sec. 1 of the Criminal Code is as follows:—

Every one who as parent, guardian or head of a family is under a legal duty to provide necessities for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

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defence proving healing through prayer to God) has no bearing on the case you have to consider. I allowed the evidence to be given as fully and fairly as it could be given at the request of the counsel for the accused, the view with which it was offered being to convince you of the good faith of the prisoner in the course he pursued in the treatment or as it really was non-treatment of his little son, to shew his good faith in omitting to do that which constitutes the gravamen of the offence with which he stands charged to-day."

I also said to the jury :—

"The sole question for you to decide is, did he (the defendant) supply medical aid or treatment to his child, when in fact it was reasonable to have done so, and when he had the ability to provide it? That he had the ability to provide medical aid for his child has been put beyond question. When I use the expression 'medical aid or treatment' or advice, let it be clearly understood that the medical aid or assistance I refer to is that which is authorized, that which is referred to in the Code, and not the treatment, if one may call it so, of any particular class or sect in the community. The law casts upon the father of a child of tender years the duty of providing necessities for his child. Now I tell you as a matter of law, necessities include medical assistance and treatment when it is reasonable and proper that medical assistance and treatment should be procured."

The evidence in the case and my charge are made part of the case, and I have reserved for the consideration of the Court the following questions :—

1. Was there sufficient evidence to warrant the verdict?
2. Was my direction to the jury that the term "Necessaries" in section 210 of the Code legally includes medicines and medical treatment correct?
3. Was I right in directing the jury that the evidence of witnesses that they had been cured or benefited by Christian Science treatment had no bearing on the case except as shewing the good faith of the prisoner?

The case was argued on February 3rd, 1903, before Moss, C.J.O., and OSLER, MACLENNAN, MACLAREN, and GARROW, J.J.A.



*A. B. Aylesworth*, K.C., and *W. W. Vickers*, for the prisoner, contended that there had been here no guilty mind—no recklessness as to human life; that nothing less than reckless and wanton negligence imports criminality: *The State v. Dorsey* (1888) 118 Ind. 167, at p. 169; that mere mistake of judgment, or even intellectual defect such as here, without any evil mind, does not constitute manslaughter by negligence at common law; *Reg. v. Elliott* (1889), 16 Cox 710; *Queen v. Senior*, [1899] 1 Q.B. 283, 19 Cox 219; *Reg. v. Wagstaffe* (1868), 10 Cox 530; *Reynolds v. United States* (1878), 98 U.S. (8 Otto) 145; *Queen v. Hynes* (1874), 8 Cent. C.C. Sess. Papers 309; *Rex v. Brooks* (1902), 9 B.C. 13; that there was no evidence here that the neglect to call in a medical man caused or accelerated the death: *Queen v. Morby* (1882), 8 Q.B.D. 571; that such evidence was necessary in a prosecution under sec. 210 of the Criminal Code; that medical assistance cannot be said to have been necessary, except in a case where death supervenes, and some one is in a position to say that this resulted from the omission to administer some particular drug; that “necessaries” in the Act only mean natural necessities such as food or raiment; that at any rate the evidence shewed that what was done here constituted a scientific system of medical treatment, and so satisfied the statutes as to necessities: Amer. and Eng. Encyc. of Law, 2nd ed., vol. 21, p. 198.

*J. R. Cartwright*, K.C., and *Frank Ford*, for the Crown, contended that the general wide term “necessaries” in sec. 209 of the Criminal Code evidently meant something more than food and clothing; that secs. 209, 210, 211 and 215 must be read together; that it was not necessary to prove evil intent in such a case as this under sec. 210: Arch. Criminal Pleading, 22nd ed., p. 750, and the cases there collected; that it is not ordinary manslaughter, but a special case; that the father here admitted that he felt something more was wanting for the child, and that if he had not been a Christian Scientist he would have called in a doctor; that medicine and medical comforts would be considered as included in “necessaries” if an infant were being sued: *Queen v. Senior*, [1899] 1 Q.B. 283, especially at p. 291; *State v. Mylod* (1898), 20 Rhode Isl. 632; Leake on Contracts, 4th ed., p. 380, citing Co. Litt. 172a;

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that Christian Science was not in fact a science, for a science must be something which can be brought to some sort of test, whereas the matter of Christian Science was spiritual, and outside the domain of evidence; that our statute is much wider than the English.

*Aylesworth*, in reply, referred to Amer. and Eng. Encyc. of Law, 2nd ed., vol. 21, p. 199.

June 29. Moss, C.J.O.:—I agree with the conclusions of the judgment about to be delivered by my brother Osler. I will only add some words of my own with the purpose of stating the grounds upon which I base my concurrence.

I do not entertain any doubt of the sufficiency of the evidence to warrant the jury in finding a verdict against the accused, and I think the learned Chief Justice rightly ruled that the case must be submitted to them.

The most important and also the most difficult question is whether on the point of the accused's neglect of duty to his child the learned Chief Justice's direction to the jury that the term "necessaries" in section 210 of the Code legally includes medicine and medical treatment, was proper and sufficient. The duty to which section 210 makes reference is a duty to supply necessaries. There is no definition of the term, but some light is thrown upon it by section 209.

What is to be included in "necessaries" is to be determined upon the circumstances of each case. And the question whether there has been neglect to supply them must also depend upon the circumstances. There may be sickness and failure to call in medical aid even where there is sufficient financial ability and yet a jury might not be justified in convicting. To the parent or other person responsible for the child's well being endeavouring to exercise his best judgment it may appear that the sickness is of a slight nature, merely one of the trifling ailments to which children are subject, and for the treatment of which even the most anxious parents do not deem a medical man's aid to be necessary.

The question for the jury in this case was whether the accused was guilty of the negligence mentioned in section 210 of the Code, thereby causing or hastening his child's death, the

negligence consisting in the failure to provide medical assistance and treatment. And to determine this it was for the jury to say whether, under the circumstances, medical assistance and treatment were necessities proper to be provided for the child, having regard to the state and condition in which the evidence shewed him to be. We have the advantage of having before us the whole of the learned Chief Justice's charge to the jury and not merely those portions which are extracted in the stated case. Reading it as delivered, I am satisfied that the learned Chief Justice presented the case to the jury in its proper aspect when he told them that as a matter of law "necessaries" included medical treatment and assistance when it was reasonable and proper that medical treatment and assistance should be provided.

I am also of opinion that the learned Chief Justice properly excluded from the jury's consideration the evidence of cures performed in Christian Science. He only received it as shewing the good faith or honest belief of the accused. But as good faith and honesty were not seriously questioned the admission of the evidence was no more than an act of consideration towards the accused. Strictly it should not have been received at all.

Under the circumstances it was of course inevitable that there should be much reference to the defence upon which the accused mainly, though not entirely, relied, viz., that of justification of the treatment which the child received according to the practice of those holding the accused's belief. But for the purposes of the trial it was proper to put that point of the case altogether to one side. The case really had to be dealt with as one of neglect to provide "necessaries" in the form of medical assistance and treatment of the kind usual and proper to be provided in cases of sickness such as this child was proved to be suffering from. And the belief or faith of the accused was not an element.

This I understand to have been the learned Chief Justice's view, and in that I concur. And I entirely agree with his forcible and appropriate remarks to the jury that while the merits or demerits of the Christian Science or faith are things with which we have nothing to do as long as it does not

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transgress or lead to a transgression of the law, the law of the land is paramount, and it is not for people to set themselves up in opposition to it; that the law of the land must be obeyed, and it must be obeyed even though there be something in the shape of belief in the conscience of the person which would lead him to obey what in his state of mind he may consider a higher power or higher authority.

And especially must there be obedience where, as in this instance, the subject of the judgment to be exercised is a child of tender years, unable to exercise any judgment of his own.

In one form or another it has been frequently said by able judges, and it cannot be too widely known or too often repeated, that where an offence consists of a positive act, which is knowingly done, the offender cannot escape punishment because he holds a belief which impels him to think that the law which he has broken ought not to exist or ought never to have been made.

OSLER, J.A.:—The prisoner was indicted for manslaughter, for that he being the parent of a certain child named Roy Lewis, then under the age of sixteen years and a member of his household, and being as such parent under a legal duty to provide necessaries for such child, did then and there unlawfully and without lawful excuse omit to provide necessary medical treatment, medicines and assistance, and other necessaries, for the said Roy Lewis, whereby the death of the said Roy Lewis was caused, etc.

The prisoner's child, an infant between six and seven years of age, and a member of his household, was ill of a disease which turned out to be diphtheria, from a Thursday to the following Tuesday, when it died of such disease. During part of this time it enjoyed what is called by the sect known as Christian Scientists, to which the prisoner belonged, mental treatment, *i.e.*, silent prayer, administered by a Christian Science "demonstrator," but not medical aid or assistance or medicine, or medical treatment as commonly understood by such expressions, as administered by any legally authorized or irregular expert in such matters.



The questions to be determined on such a prosecution as the present are: (1) Whether the prisoner was under a legal duty to provide necessaries for the child, which involves the further question whether what was omitted to be provided was a necessity under the circumstances; and (2) If such duty existed, whether the prisoner, without lawful excuse, omitted to perform it.

It is unnecessary to enquire into what was the nature and extent of the parent's duty at common law to an infant of tender years in his care, charge and custody, or whether at common law a parent was under an obligation to provide for such an infant medicines or medical aid or treatment, a question upon which there has been much difference of opinion.

The indictment in this case is founded upon section 210 of the Criminal Code, which enacts that "Every one who as parent, guardian or head of a family, *is under a legal duty* to provide necessaries for any child under the age of sixteen years, is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of the child is caused or if his life is endangered or his health is, or is likely to be, permanently injured by such omission."

The legal duty referred to in this section, for the consequences resulting from the breach of which the prisoner was indicted, is that imposed by section 209, "Every one *who has charge* of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, . . . is under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such person is caused, or if his life is endangered, or his health has been, or is likely to be, permanently injured, by such omission."

The question, therefore, of the prisoner's guilt or innocence, depends upon whether he had or had not omitted, without lawful excuse, to provide necessaries, that is to say the necessaries of life, whatever they were, for his child, in consequence of which its death was caused. What are or may be such

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necessaries in any particular instance, is not defined by the Code, but I can see no reason for saying that medical aid, assistance or treatment may not, under the circumstances, be necessary quite as much as food and clothing are so. That was evidently the opinion of the learned Chief Justice in *Reg. v. Senior* (1899), 1 Q.B. 283-292, as regards the duty of a parent at common law. *A fortiori* the modern statutory provision admits of as wide a construction. The question, therefore, was one for the jury under the direction of the Judge as in civil cases. It was for the latter to say whether medical aid and treatment or medicines were capable of being necessities within the meaning of the Code, and for the former to determine whether in fact under the circumstances they were necessities. The jury were told that as a matter of law, necessities included medical treatment and assistance when it was reasonable and proper that medical treatment and assistance should be provided — a part of the direction which I do not quarrel with—but also that the medical aid referred to was “that which was authorized, that which was referred to in the Code, not the treatment, if one might so call it, of any particular class or sect in the community.” I am not sure that I understand what the learned Judge meant by “authorized” medical aid, assistance and treatment. It cannot be laid down as matter of law in dealing with a case of this kind that medical aid, assistance and treatment, must necessarily be of an authorized kind, if by that is meant that it can only be administered or furnished by a legally qualified physician or practitioner belonging to one of the recognized schools of medicine. So much, indeed, may be inferred from the 212th section of the Code. The illness might be of such a character as to make it apparent to an ordinarily prudent person that the assistance of a qualified expert, *i.e.*, a physician or properly skilled person on such matters, should be invoked if he had the means of doing so, or it might be such as to suggest that nothing was necessary beyond the attentions of a trained or experienced nurse or parent, and the administration of ordinary or well known remedies. This part of the charge, though in my opinion erroneous, cannot, however, be said to have prejudiced the prisoner, because the child received no

medical aid or assistance of any kind beyond the Christian Science treatment referred to, and it was proved that this was by reason of the peculiar tenets held by the prisoner which are opposed to dealing with diseases otherwise than by prayer.

There was evidence on which the jury might find that medical aid and assistance ought to have been provided, and the further questions for their determination were whether it had been in fact provided, and if not, whether it had been omitted — neglected — by reason of any lawful excuse. In dealing with all these questions, the jury would have to take into consideration, and they were so directed, the prisoner's knowledge of the child's illness and its serious nature, and his ability to procure and pay for medical aid and treatment.

In giving evidence on his own behalf, the prisoner admitted that the child's illness was such that at one period of it he would have called in a doctor if he had not been a Christian Scientist. Speaking for myself, I must say that in such a case as this a jury ought to be told that no matter how earnestly a parent might believe in the efficacy of Christian Science treatment as developed in Mrs. Eddy's handbook of the doctrines of the sect, yet if they came to the conclusion that medical aid and treatment was necessary, they ought also to find that it would not be furnished by means of mental treatment by a Christian Science "demonstrator." Persons *sui juris* may by mutual consent, and within certain limits, practise upon each other what experiments of this kind they please, and in some instances and in some kinds of disorders, where the mind of the patient is responsive to the treatment, it may possibly be done with beneficial results. But it would be shocking if in the case of infants or others incapable of protecting themselves, they and the community in which they lived were to be exposed to danger from contagious or infectious diseases which the instructed common sense of mankind in general does not as yet find or admit to be curable by means only of subjective or mental treatment.

If I rightly apprehend the scope of the sections of the Code which I have referred to, namely, that they do, where the necessity exists for it, impose the obligation upon a parent of providing medicine, or medical aid or treatment for his infant

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child, some observations of the late L. C. J. Russell in the recent case of *Reg. v. Senior* (1899), 1 Q.B. 283-291, are quite pertinent. In that case the prisoner was a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of the sick by means of prayer are not dissimilar from those held by Christian Scientists, and are, as the Chief Justice said, certainly to the ordinary apprehension, remarkable. The prisoner's child was dangerously ill, but no medical aid was given it, in consequence of which it died. "Neglect," said the Chief Justice, "is the want of reasonable care—that is the omission of such steps as a reasonable prudent person would take—such as are usually taken in the ordinary experience of mankind, that is in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree (he says) with the statement in the summing up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation; and that regard must be had to the thoughts and habits of the time. At the present day, when medical aid is within the reach of the humblest and poorest member of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect. Mr. Sutton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except one thing which was necessary—he ought not to be found guilty of manslaughter on the ground that he abstained from providing medical aid for his child, in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn?"

In *People v. Pierson* (1903), 81 N.Y. Supplement 214, decided since the argument of the case at bar, and similar in its circumstances, the Court says, "The guide to proper conduct must be ascertained by asking what would an ordinarily prudent person, solicitous for the welfare of his child, do under the circumstances of the particular case?" The convic-



tion in that case was quashed for the insufficiency of the indictment. I also refer to *Rex v. Brooks* (1902), 9 B.C. 13, also a case like the present; the conviction was upheld by the Supreme Court against the same contention as the prisoner here puts forward.

I think there was sufficient evidence to warrant the verdict of all the essential facts, namely, the dangerous character of the child's illness, the necessity under the circumstances for medical aid and treatment, the prisoner's knowledge of both, his omission, without lawful excuse, to provide such medical aid, and the consequence of such omission.

The evidence admitted at the trial of cures believed by the prisoner and other members of the sect to have been performed in "Christian Science," though admitted only for the purpose of shewing his "good faith," was not, in my opinion, relevant or admissible, at all, if, as I think, his motive or belief was not a lawful excuse for omitting to provide what the statute law requires.

I answer the first question in the case reserved in the affirmative.

The second and third I also answer in the affirmative, with the qualifications above stated as to each.

MACLAREN, J.A.:—The real question in this case is what Parliament meant by the word "necessaries" in enacting sections 209 and 210 of the Criminal Code. In my opinion it was used in the well-known sense which it had acquired with reference to "necessaries," for which an infant might contract liability. These are said in *Coke on Littleton* 172*a*, to be "his necessary meat, drink, apparel, necessary physic and such other necessaries." The list has been from time to time extended to such other articles as are reasonably fit to maintain him in his state, station and degree, and are suitable to his fortune and circumstances. It, therefore, becomes a question to be decided by the special facts and circumstances of each particular case.

When a parent was made criminally responsible by section 210 for omitting without lawful excuse to provide necessaries for a child under sixteen years of age, I think that there was imposed, in case of sickness, the duty of providing at least

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“necessary physic,” to use the words of Lord Coke. It can scarcely be contended that Parliament, in enacting the section, meant to include the treatment of Christian Science as one of the necessities to be provided in case of sickness. Nor do I think that the accused was at liberty to substitute this for the requirements of the statute notwithstanding his *bonâ fide* belief in its efficacy. He may, in addition to what the statute requires, provide or apply any other treatment which may be either beneficial or harmless, but it should be in addition to and not in lieu of or a substitute for, that which the statute requires.

In determining whether it is the duty of a parent in a particular case to furnish medicine or medical treatment for a young child, all the surrounding circumstances must be taken into account. The financial means of the parent and the accessibility of the medicine or the medical man are elements ; but neither of these arises in the present instance. The accused had ample means, and it is well known that in Toronto even the best medical skill is available to those who may unfortunately be without means. The *bonâ fide* belief of the parent as to the serious nature of the illness or otherwise is also important. If the parent honestly believes that the illness is not serious, and is not guilty of negligence in failing to inform himself on this point by enquiry, examination or otherwise, then the failure to provide medical aid would not be a breach of the statute.

In the present case the accused admits that he realized the serious condition of the child, and after describing the symptoms, adds, “I knew there was something that wanted looking after.” When asked “If you were not a Christian Scientist you would have called in a doctor?” He answered, “I certainly should.” The medical evidence goes to shew that if the child had received the medical treatment usual in such cases its life would have been prolonged, and in all probability it would have recovered.

Coming to the questions submitted for our consideration in the case reserved, I am of opinion, in answer to the first, that there was sufficient evidence to warrant the verdict of the jury.

As to the second question, whether the direction of the learned Chief Justice to the jury that the term "necessaries" in section 210 of the Code legally includes medicines and medical treatment was correct, the precise language of the charge must be looked at. He said: "I tell you as a matter of law, necessities include medical assistance and treatment when it is reasonable and proper that medical assistance and treatment should be procured." And again: "The sole question for you to decide is, did he (the defendant) supply medical aid or treatment to his child when, in fact, it was reasonable to have done so, and when he had the ability to provide it?" I am of opinion that this direction was right. It is substantially this: that the word "necessaries" may include medical aid or treatment, and does include it, when it is reasonable and proper that it should be procured. It is not disputed that the accused omitted to furnish medicine or medical aid to the child. The charge, I think, sufficiently left it to the jury to say whether such omission was or was not without lawful excuse. I am not sure that I can endorse the language of the charge when it says that medical aid or assistance must be such as is "authorized," referring, I presume, to those registered under the Medical Act of the Province. But as it is not pretended that there was any medicine or medical treatment whatever in this case no difficulty could possibly arise on this ground.

The third question submitted to us is whether the trial Judge was right in directing the jury that the evidence of witnesses that they had been cured or benefited by Christian Science treatment had no bearing on the case except as shewing the good faith of the prisoner. If I am right in what I have said above as to the meaning of the word "necessaries" in section 210, then the evidence in question could not have any effect beyond that stated, if indeed it was admissible at all. The legal duty and the omission to perform the duty being both established there remained only the question of the lawful excuse. There might be good faith on the part of the accused, and yet it might be competent to the jury to find that, under all the circumstances of the case, it did not amount to a lawful excuse. Where it is a simple omission to perform a statutory duty a *mens rea*, in the ordinary sense of that term, or the absence of

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good faith, is not necessary to justify a verdict of guilty. An intentional omission to do what the statute requires to be done is sufficient. In the case of *The Queen v. Senior*, [1899] 1 Q.B. 283, where the language of the statute was "wilfully neglects," the verdict against the accused in a case almost identical with the present was affirmed, although it was urged that he was a very affectionate parent and had done everything possible for the child except obtaining medical aid, against which he had conscientious scruples. In my opinion our statute is stronger than the English one, and I have no hesitation in endorsing the charge of the learned Chief Justice on this point.

MACLENNAN and GARROW, JJ.A., concurred.

A. H. F. L.

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## [IN THE COURT OF APPEAL.]

## ANDERSON V. ELGIE.

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June 29.

*Dower—Equity of Redemption—Conveyance by Husband alone—42 Vict. ch. 22 (O.)—Discharge of Mortgage—Effect of.*

On the 8th February, 1881, the owner of land subject to a mortgage, dated the 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the money advanced upon the second mortgage was applied in payment of the first mortgage, and the first mortgagees executed a discharge, which was registered on the 5th March, 1881. On the 30th September, 1881, the owner executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar dower. Neither the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the mortgagees, in the exercise of the power of sale, on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th February, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of the 30th September, 1881, brought this action for dower on the 11th September, 1902:—

*Held*, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 Vict. ch. 22 (O.), which became law on the 11th March, 1879.

(2) The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to revest the premises in the mortgagor, but in the second mortgagees.

Judgment of Lount, J., reversed.

APPEAL by the defendant from the judgment of Lount, J., in favour of the plaintiff in an action for dower.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—The plaintiff claims to be entitled to dower out of the east half of lot 27 in the 5th concession of the township of Luther. He asserts title thereto as the assignee or grantee of one Sarah Morrison, the widow of John Morrison, a former owner of the property.

The defendant is in possession of the premises under an agreement for the purchase thereof from the Agricultural Savings and Loan Company, mortgagees under an indenture of mortgage made by John Morrison and dated the 8th February, 1881. At the time of the execution of the mortgage John Morrison and Sarah Morrison were man and wife,

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but she was not a party to nor did she execute the mortgage, in which John Morrison is described as a widower. The mortgage was given to secure an advance of \$2,500 to John Morrison, who appears to have made a statutory declaration that his wife had died in November, 1880.

At the time of the application for the advance and the execution of the mortgage to the company the premises were subject to a mortgage in fee made by John Morrison, his wife joining to bar her dower, in favour of the Canada Landed Credit Company. This mortgage is dated the 30th January, and registered the 11th February, 1879. A portion of the advance from the Agricultural Savings and Loan Company was applied in payment of the mortgage held by the Canada Landed Credit Company, and thereupon they executed a discharge dated the 1st March, 1881. On the 5th March, 1881, the Agricultural Savings and Loan Company caused the discharge to be registered in the proper registry office.

By indenture made in pursuance of the Short Forms of Conveyances Act, dated the 30th September, 1881, between John Morrison, the grantor, his wife Sarah Morrison, who joined therein for the purpose of barring her dower, and the plaintiff, the premises were granted and conveyed to the plaintiff, and it is under this instrument that the plaintiff now claims dower as assignee of Sarah Morrison.

The plaintiff thus became entitled to the equity of redemption, and it is said became liable as between himself and John Morrison to pay the Agricultural Savings and Loan Company's mortgage, but this does not very clearly appear.

Neither the plaintiff nor John Morrison paid the principal money secured by the mortgage, which fell due and became payable on the 1st February, 1886, and the Agricultural Savings and Loan Company took proceedings under the power of sale, and, by agreement dated the 27th February, 1892, contracted to sell the premises to the defendant, who has ever since been in possession as purchaser.

John Morrison died on the 19th February, 1901, leaving Sarah Morrison surviving him, and this action was commenced on the 11th September following.

The case was tried by the late Mr. Justice Lount, who gave judgment in the plaintiff's favour, holding him entitled to recover dower out of the premises.

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The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 19th May, 1903.

*R. Bayly*, K.C., for the appellant. John Morrison was never at any time the owner of the legal estate, as the land was mortgaged continuously by him from before the issue of the patent to the time he conveyed to the plaintiff. There can therefore be no dower: *Gardner v. Brown* (1890), 19 O.R. 202; *McLean v. Laidlaw* (1846), 2 U.C.R. 222. He was not the beneficial owner at the time of his death, and his wife was therefore not dowable out of the land: R.S.O. 1897, ch. 164, sec. 2. As the law stood before the 11th March, 1897, it was unnecessary that the wife should execute a bar of dower in the mortgage to the Agricultural Savings and Loan Company, as the bar of dower in the Canada Landed Credit Company's mortgage was, as the law then stood, absolute, and not merely for the purposes of the mortgage: *Armour on Real Property*, pp. 123, 124, and cases there collected. The Agricultural Savings and Loan Company believed that Morrison was a widower, and so believing registered a discharge of the prior mortgage, instead of taking an assignment thereof. The registry of the discharge operated as a conveyance by the first mortgagees to the second mortgagees of all the interest of the former in the land, the latter being at the time of such registry the assigns of Morrison: R.S.O. 1877, ch. 111, sec. 67; *Brown v. McLean* (1889), 18 O.R. 533; *Re Luckhardt* (1898), 29 O.R. 111, 114-116, 118. The plaintiff when he obtained the conveyance in September, 1881, had notice of the mortgage to the Agricultural Savings and Loan Company and that Morrison falsely represented himself therein to be a widower, and, by reason of such misrepresentation and the mistake occasioned thereby, that company and their vendee, their appellant, are entitled to be subrogated to the rights of the Canada Landed Credit Company under their mortgage to the extent of the amount paid to the latter company and interest thereon: *Brown v. McLean*, 18 O.R. 533; *Abell v. Morrison* (1890), 19

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O.R. 669. The effect of the conveyance from Morrison to the plaintiff was to merge the dower interest (if any) of Sarah Morrison in the fee then acquired by the plaintiff: *Armour on Real Property*, p. 235.

*J. Bicknell*, K.C., for the plaintiff. Sarah Morrison not having barred her dower in the mortgage to the Agricultural Savings and Loan Company, her inchoate right to dower remained unaffected by that mortgage, and that right passed to the plaintiff by the conveyance of September, 1881. In order to give effect to the mortgage made before the grant from the Crown it was necessary that the fee simple granted by the Crown should pass through Morrison. The mortgage operated by way of estoppel only. At the lowest Morrison had a momentary seisin of the legal estate between the time of the taking effect of the grant and the passing of the estate from him to the Canada Landed Credit Company: *Cameron on Dower*, p. 114. Upon the mortgage being released and discharged the fee simple became vested in Morrison, and the inchoate right to dower revested. The discharge did not operate as a transfer to the second mortgagees of the right to dower. Morrison did not purport to convey to the Agricultural Savings and Loan Company the right of dower of his wife, and no greater effect can be given to the mortgage than is necessary to transfer the estate of the mortgagor. The appellant is not a transferee of the Canada Landed Credit Company, nor has he any interest in the lands other than was conveyed to his vendors by Morrison. The evidence shews that the plaintiff had no knowledge of any fraud committed by Morrison. No privity is shewn between the appellant and the Canada Landed Credit Company, and he cannot be subrogated to their rights. The delay of the plaintiff in asserting the right to subrogation is fatal. Subrogation must arise either by agreement or under a judgment. The right to dower did not merge in the plaintiff's equity, but is a separate and distinct right: *Cummins v. Fletcher* (1880), 14 Ch. D. 699, 708; *Allen v. Edinburgh Life Assurance Co.* (1877), 25 Gr. 306; *Cameron on Dower*, pp. 290, 291.



June 29. Moss, C.J.O. (after stating the facts as above):—  
Upon the appeal several objections were presented by counsel for the defendant.

The first was that, at the date of the indenture under which the plaintiff claims, Sarah Morrison was not entitled to an inchoate right of dower in the premises which could prevail over the Agricultural Savings and Loan Company's mortgage, and that thereafter no such right nor any right of dower vested in her; and the point seems well taken.

It is asserted that at no time was John Morrison ever seised in fee of the premises so as to entitle his wife to dower at common law, but it is only necessary to consider the state of the title from and after the execution of the mortgage to the Canada Landed Credit Company on the 29th January, 1879.

As the law then stood, Sarah Morrison, having joined in the mortgage and thereby barred her dower, became entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled. And, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity of redemption, either wholly, by an absolute conveyance, or partly, by a mortgage: *Fitzgerald v. Fitzgerald* (1903), 5 O.L.R. 279. And this vested right was not interfered with or affected by the Act 42 Vict. ch. 22 (O.), which became law on the 11th March, 1879: *Martindale v. Clarkson* (1880), 6 A.R. 1; *Beavis v. Maguire* (1882), 7 A.R. 704.

Therefore, the mortgage to the Agricultural Savings and Loan Company, though made on the 8th February, 1881, was a conveyance to that company of the premises free from any claim to dower on the part of Sarah Morrison. And her right to dower was thus reduced to dower in any interest in the premises to which her husband might die beneficially entitled. It was argued that the effect of the discharge of the Canada Landed Credit Company's mortgage was to revest the mortgaged estate in John Morrison for a period sufficient to restore his wife's right to dower—that there was a momentary seisin, and that the wife's dower vested. But the mortgage to the Agricultural Savings and Loan Company had been executed and delivered for some weeks before the execution of the discharge,

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and the effect of the registration of the discharge was not to revest the premises in John Morrison but in the loan company, to whom he had conveyed them : R.S.O. 1897, ch. 136, sec. 76. The prior mortgagees' estate was thus replaced in the parties best entitled to it, viz., the Agricultural Savings and Loan Company, whose money had been advanced to pay the prior claim on the premises. It thus appears that the estate of the Agricultural Savings and Loan Company, and of the defendant as their purchaser and assignee in equity, is paramount to any claim of dower on the part of Sarah Morrison, or the plaintiff claiming through her.

In this view it is unnecessary to deal with the other objections.

The appeal should be allowed and the action dismissed with costs.

MACLENNAN, J.A.:—I think this appeal must be allowed. The action is for dower, the plaintiff claiming as assignee of the alleged dowress. The case made is that the plaintiff purchased the land from the owner subject to a mortgage, in which was no bar of dower ; that the mortgagee sold the land to the defendant, under the power of sale in the mortgage, whereby the plaintiff's title other than the right of dower acquired from the wife of the grantor was extinguished ; and that the grantor having died before action, on the 19th February, 1901, a right to recover the widow's dower thereby accrued to the plaintiff.

The defence is that, although the mortgage under which defendant claims by the exercise of the power of sale therein, and which was made to the Agricultural Savings and Loan Company on the 8th February, 1881, was made without a bar of dower, there was then outstanding a mortgage to the Canada Landed Credit Company, made with bar of dower, on the 30th January, 1879, by reason whereof the only right which the wife had when the subsequent mortgage was made, was at most a right to dower in equity, contingent upon her husband's dying beneficially entitled, which he did not do.

I think that defence is made out, and that it is an answer to the action.

By R.S.O. 1897, ch. 164, sec. 2, originally 4 Wm. IV. ch. 1, sec. 13, dower in equitable estates was only given when the husband died beneficially entitled, and, assuming that an equity of redemption of a mortgage in which the wife has barred her dower, is an equitable estate within that statute, as to which see *Moffatt v. Thompson* (1851), 3 Gr. 111, and other cases cited in Armour on Titles, 3rd ed., p. 200, the plaintiff's grantor did not in the present case die beneficially entitled, and his beneficial interest was extinguished by the sale and conveyance to the plaintiff, while the Agricultural Savings and Loan Company's mortgage was still subsisting.

If the mortgage to the Canada Landed Credit Company had been made after the Act 42 Vict. ch. 22, sec. 1 (O.), had been passed, the case would have been different, but that Act was not passed until the 11th March, 1879, some weeks after the mortgage had been made, and it has been held in this Court, *Martindale v. Clarkson*, 6 A.R. 1, that that Act is not retrospective, and relates only to mortgages made after it was passed.

The action should be dismissed with costs here and below.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

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## [DIVISIONAL COURT.]

D. C.

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July 18.

MCGILLIVRAY ET AL. V. MUIR.

*Justice of the Peace—Penalty—Excessive Fee—Information for Indictable Offence—Pleading—Amendment.*

An information having been laid by the plaintiffs before the defendant, a justice of the peace, for an indictable offence under secs. 210 (2) and 215 of the Criminal Code, over which the defendant had no summary jurisdiction as a justice:—

*Held*, that he was not entitled to any fee whatever, and that the plaintiffs, while they were entitled to recover by action the amount of the fee which they paid, could not maintain an action under sec. 3 of R.S.O. 1897, ch. 95, or under sec. 902, sub-sec. 6, of the Criminal Code, to recover a penalty from the defendant for receiving a larger amount of fees as justice of the peace than he was entitled to.

*Bowman v. Blyth* (1856), 7 E. & B. 26, applied and followed.

It was alleged by the statement of claim that the defendant wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiffs the sum of, etc., contrary to the Ontario Act. At the trial the plaintiffs were allowed to amend by substituting “wilfully” for “maliciously and without reasonable or probable cause,” and by making an alternative claim under sec. 902, sub-sec. 6, of the Criminal Code.

*Held*, that the amendments were properly made.

APPEAL by the defendant from a judgment of the junior Judge of the county court of Bruce in favour of the plaintiffs in a *qui tam* action under sec. 3 of R.S.O. 1897, ch. 95, to recover from the defendant the penalty of \$80 provided by the Act, for receiving a larger amount of fees as a justice of the peace than he was entitled to, and for the amount of fees so received, being \$1.80. The \$1.80 had been paid into Court and not accepted by the plaintiffs. The facts are stated in the judgment.

The appeal was heard by a Divisional Court composed of FERGUSON and MACMAHON, JJ., on the 11th and 12th June, 1903.

*T. Dixon*, for the appellant.

*J. Idington*, K.C., for the plaintiffs.

July 18. The judgment of the Court was delivered by MACMAHON, J.:—An information had been laid by the plaintiff Vair, on behalf of his co-plaintiff Mrs. McGillivray, before the defendant, for an indictable offence under secs. 210 (2) and 215



of the Criminal Code, over which the magistrate had not summary jurisdiction, and, therefore, was not entitled to any fees whatever.

There is a schedule and table of fees to ch. 95, R.S.O. 1897, the first section of which provides that "The fees mentioned in the schedule to this Act, and no others, shall be and constitute the fees to be taken by justices of the peace, or by their clerks, for the duties and services therein mentioned; and shall be the costs to be charged in summary proceedings or convictions before the justice, where no other fees are expressly prescribed."

The Criminal Code gives a schedule of fees to be taken by justices in proceedings under the Summary Convictions Part (LVIII.) of the Act, containing items of fees exactly similar to those in the schedule to the Ontario Act. And sec. 871 of the Code provides that "The fees mentioned in the following tariff, and no others, shall be and constitute the fees to be taken on proceedings before justices in proceedings under this part."

The third section of the Ontario Act provides that "Every justice wilfully receiving a larger amount of fees than by law are authorized to be received, shall forfeit and pay the sum of \$80, together with full costs of suit, to be recovered by any person who sues for the same . . . one moiety whereof shall be paid to the party suing, and the other moiety . . . for the uses of the Province."

The wording in the Code is the same, and the penalty is the same, the only difference being that under the Dominion Act one moiety is payable for the public uses of Canada.

In the statement of claim (paragraphs 6 and 9) the allegation is that "the defendant . . . wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiff Louisa McGillivray the sum of \$1.80," etc.

Counsel for the defendant, at the opening of the trial, urged that the action was improperly brought under the Ontario statute, the offence charged in the information taken before the defendant being for a violation of the Criminal Code, and that the Dominion Act, sec. 902, sub-sec. 6, of the Criminal Code, governed.

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The plaintiffs' counsel then applied to amend the 9th paragraph of the statement of claim, by striking out the words "maliciously and without reasonable or probable cause" and substituting the word "wilfully" therefor, which amendment was allowed by the trial Judge. And after the trial he allowed an amendment to the record (asked for at the trial) by permitting the plaintiffs to add a paragraph to the statement of claim setting up in the alternative that the defendant was liable to pay the penalty imposed by sub-sec. 6 of sec. 902 of the Criminal Code.

One ground of the appeal is: "That the notice of action and the pleadings not having set out that the defendant 'wilfully' received the fees mentioned, no amendment should have been allowed to the 9th paragraph of the statement of claim, as it was permitting a new case to be made out, not covered by the notice."

The notice—if a notice in this case was necessary—is for the purpose of advising the defendant what the alleged cause of action is, viz., that he had demanded and received fees not allowed by law. The plaintiffs in order to recover the penalty must prove that the fees were received not erroneously under a misapprehension of fact, but "wilfully," which means "purposely," or "intentionally," knowing he had no right to receive the fees: *Hutchinson v. Manchester, etc., R. W. Co.* (1846), 15 M. & W. 314; *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, at p. 174; *Wilson v. Manes* (1897), 28 O.R. 419, at p. 433.

Whether he received it "wilfully" or not is a question of fact to be decided by the tribunal trying the action. If the amendment would substitute a different transaction from that alleged, it ought not to be made: *Brashier v. Jackson* (1840), 6 M. & W. 549. But if the transaction is not altered by the amendment but remains precisely the same, the amendment ought to be allowed: *Cooke v. Stratford* (1844), 13 M. & W. 379.

The defendant would require the same evidence to meet the unamended record as he would after it had been amended.

The amendments were, I consider, properly made.

The fee received was not paid voluntarily, as it was shewn that the amount was demanded from Vair, who took a receipt therefor; and the learned County Court Judge found that the defendant, who, according to the evidence, had acted as a justice of the peace for twenty-five years, intentionally took the fee of \$1.80, knowing he had no right so to do. There is ample evidence to sustain the finding.

The ground principally relied upon in support of the appeal was that the Act only applies to cases where a justice acting under the Summary Convictions Act wilfully received a larger amount of fees than by the tariff he was authorized to receive. And, as the fee he charged and received was in connection with an indictable offence for which no fee is authorized either by the tariff of the Province or of the Dominion, no action could be maintained against him for the penalty.

In *Bowman v. Blyth* (1856), 7 E. & B. 26, the action was brought under 26 Geo. II. ch. 14, sec. 2, which provides that where a clerk to a justice demanded or received any other or greater fee than was authorized by the table of fees to be taken by clerks of justices of the peace, to be settled by the justices at their general quarter sessions of the peace, which table of fees being approved by the next general sessions, etc., he was liable to a penalty of £20. In that case, a table of fees had been prepared by the quarter sessions, but was not approved, as required by the statute, and the Court of Queen's Bench held that, as it had not been approved, no tariff of fees was in force, and therefore an action would not lie against a clerk of the justices for the penalty for taking fees contrary to it.

Our Acts already referred to authorize the taking by the justices of the fees mentioned therein solely in cases where the magistrate has jurisdiction under the Acts relating to summary convictions, and it is for an infraction of either of these Acts by wilfully taking a larger fee in such cases that he may be penalized.

There is no Act of Parliament authorizing the taking of a fee on a charge made for an indictable offence, which was claimed and taken by the defendant in this case, and he cannot be sued for a penalty, for none is attached. That is the effect of *Bowman v. Blyth*, 7 E. & B. 26.

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The defendant might have been indicted for extortion under sec. 905 of the Criminal Code: see *Regina v. Tisdale* (1860), 20 U.C.R. 272.

The appeal must be allowed, and judgment directed to be entered for the defendant with costs, except as to the sum of \$1.80, being the amount illegally received by the defendant and paid into Court, for which there will be judgment for the plaintiffs with Division Court costs, which sums are to be set off against the defendant's costs, and the defendant will be entitled to issue execution for the balance.

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[BOYD, C.]

ATTORNEY-GENERAL ET AL. V. CITY OF TORONTO ET AL.

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June 24.

*Municipal Corporations—Establishment of Park—By-law—Dedication of Land Held by Corporation in Fee—Subsequent Leases for Building Purposes—Injunction—Private Plaintiff—Interest.*

A by-law was passed by the defendant corporation in 1880 purporting to "establish" a park on the "Island," which was granted to the corporation by the Crown in fee in 1867, and certain lots were designated therein which, "with such other lands as may hereafter be obtained from lessees or otherwise," were to form a park. Other lands were, in 1887, directed to be taken and expropriated in order to enlarge the "Island Park," but no general plan or scheme for park improvements was considered till 1901, when a special committee was appointed to elaborate a plan. The defendant corporation from 1880 till 1901 acted on the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rent and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners. The park scheme was not abandoned, but the details and the area were modified from time to time by successive councils:—

*Held*, that the corporation had not exceeded their powers in so dealing with the land designated. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee, and the fact of corporate action being embodied in a by-law implies its revocability.

*Held*, also, that a person who was joined as a plaintiff, claiming under a lease made prior to the park scheme, and renewed in 1895, after registration of plans made in 1883 and 1890, which shewed that the corporation had sanctioned the subdivision of the lands in question into building lots, had not such an interest, by reason of a special grievance, as would entitle her to have the corporation restrained from granting to one of the defendants a building lease of part of the lands in question.

THIS action was brought by the Attorney-General for Ontario at the relation of Richard A. Donald, President of the Island Association, and Mary T. Smith, as well on behalf of themselves as on behalf of all other lessees of the corporation of Toronto of lots upon the Island, within the liberties of Toronto, as also on behalf of all other ratepayers of the city of Toronto, and also by Mary T. Smith as a co-plaintiff in her own right.

The plaintiff claimed:—

1. A declaration that by-law No. 4168 passed by the council of the corporation of Toronto on the 2nd June, 1902, by which the corporation purported to take certain lots out of the lands dedicated for park purposes by by-law No. 1028, passed in November, 1880, was illegal and invalid.

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2. A declaration that the corporation could not lawfully revoke the dedication of the said park lands.

3. An injunction restraining the corporation from granting to the defendant Lemon a lease of a certain part of the said park lands proposed to be leased to him, or from erecting a dwelling house on the said lands.

The corporation alleged that at the time of passing by-law No. 1028 in November, 1880, the Island lots in question, Nos. 56 to 60, inclusive, although included in that by-law, were under lease and were in fact therefore not dedicated. It appeared in evidence that prior to the alleged dedication of November, 1880, the lessees of these lots had incurred forfeitures of their respective leases through breach of covenants therein, and that prior to the passing of the by-law the council of the corporation had passed a resolution declaring the leases in question null and void. Notwithstanding this resolution of the council, but subsequent to the by-law of November, 1880, rent appeared to have been accepted from all these lessees, and buildings erected upon the several lots according to provisions contained in said leases, but since that time the terms for which the original leases had been granted had fallen in, and the city had entered into possession of the greater portion of some of the lots in question.

It was stated by counsel for the plaintiffs that all that they in fact claimed were the lands which were now actually in possession of the corporation.

The case was tried before BOYD, C., without a jury, at Toronto on the 20th and 22nd June, 1903.

*John T. Small*, for the plaintiffs. The plaintiffs contend that by-law No. 1028, passed in November, 1880, is a sufficient dedication of the lands in question. In the first section of that by-law it is enacted that the lands in question and other lands "should be set aside, devoted to, and form a park, to be known as the Island Park." Then the second section of the by-law deals particularly with these lots, and provides that if an hotel of a defined character be erected within two years, then the council might lease them for the purpose of an hotel, but if not

then it is provided that these lands "*shall form part of the said Island Park thereafter and forever.*" The corporation were seised in fee of the Island by virtue of the patent granted by the Crown in 1867, and are in the same position as a private individual for the purpose of dedication. It has been held that a tow path company might dedicate the tow path as a public walk so long as that use did not interfere with the performance of the statutory powers of the company: *Grand Junction Canal Co. v. Petty* (1888), 21 Q.B.D. 273. These words are amply sufficient to create a dedication in perpetuity. The whole public are interested in the maintenance of the park lands, and the Attorney-General has permitted the action to be brought, which enables the Court to grant relief in such a case, even if there be no special private wrong. It was owing to the absence of the Attorney-General that the plaintiffs failed in *Hope v. Hamilton Park Commissioners* (1901), 1 O.L.R. 477. These lands are essential to the park system on the Island, as they constitute the only remaining sufficient means of communication between the lands on the Bay shore and the Lake shore. As to dedication, once the lands have been dedicated, the council cannot revoke the dedication: *Attorney-General v. Goderich* (1856), 5 Gr. 402. It is laid down in *Warren v. Jacksonville* (1853), 15 Ill. 236, that the public is an ever existing grantee capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. The lands set apart by the by-law in question have been accepted by the public. It was shewn in evidence that when one of the Island lessees erected a windmill on part of lot 58, he was notified by the civic authorities to remove it, as it was upon park lands. A pavilion was erected on these lands and they were used by the public as the rest of the lands. The council has no power to divert the lands from the use to which they have been dedicated: *Attorney-General v. Brantford* (1858), 6 Gr. 592; *Guelph v. Canada Co.* (1853), 4 Gr. 632. In the latter case it is said that when a dedication has once taken place, whether made by a corporate body or an individual, the party dedicating has, as the very terms import, parted with all control over it inconsistent with the use of it to which he has appropriated it.

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See also *Coffin v. Portland* (1886), 27 Fed. Rep. 412. In *Attorney-General v. Tarr* (1889), 148 Mass. 309, the council of the town of Gloucester set apart a piece of land as a public landing place for the inhabitants of Gloucester forever, and it was held that the grant was irrevocable and that no acceptance by the inhabitants was necessary. As to the position of Mary T. Smith as a plaintiff in her own right, it appears that she is the assignee of a lease from the defendant corporation of a tract of land facing upon the park lands in question, and while the building which the defendant Lemon seeks to erect would not cause any great immediate damage, she is particularly interested in having it declared that the by-law is invalid, as, if it is not quashed, the city will be able to lease other portions of the lands in question so as to interfere with her present enjoyment of the park and an extended view of over 1,000 feet, by building up to within 50 feet of her premises. She has a sufficient interest: *Attorney-General v. Hanwell Urban Council*, [1900] 1 Ch. 51.

*J. S. Fullerton*, K.C., and *W. C. Chisholm*, for the defendant corporation, and *Frank Denton*, K.C., for the defendant Lemon. There was no intention to dedicate the lots now in question; although the council passed a resolution declaring the leases null and void, this was not acted on. The words of the by-law are words denoting futurity: clause 1 says,—“shall be set aside, devoted to, and form a park.” This part of the park lands has not been specially improved. The council has power to change the use of lands set apart for park purposes under the Municipal Act, R.S.O. 1897, ch. 223, secs. 576 (3), 637 (1); see also *In re Peck and Town of Galt* (1881), 46 U.C.R. 211; *Attorney-General v. Toronto* (1864), 10 Gr. 436. The word “square” was held in this last case to include a “park,” and the council of the defendant corporation has the right to close the whole or a portion of the park, where such park has, as in this case, been dedicated by the council, and, as here, individual rights have not intervened.

*Small*, in reply. It is not necessary for the plaintiffs to meet the case sought to be set up by the defendants in their evidence as to the leases having been treated as valid. It is not disputed that the greater part of these lands have now



fallen into the possession of the city, and with respect to these the plaintiffs ask for a declaration of the Court as was done in *Attorney-General v. Brantford*, before cited. Even if the lands were actually subject to lease at the time of dedication, *Carey v. Toronto* (1885), 11 A.R. 416, is a decision of the Court of Appeal plainly applicable here. In that case the Court of Appeal held that lands which were under lease at the time of dedication were to be taken as dedicated subject only to the lease. Counsel for the defendants rely especially on the Municipal Act and on two cases. In *Attorney-General v. Toronto*, 10 Gr. 436, it is evident from the judgment that the Chancellor was of opinion that dedication had not been proved. The civic authorities had merely used a certain piece of land for the purpose of a park for a certain period without making any dedication. Here there was a dedication. In *In re Peck and Town of Galt*, 46 U.C.R. 221, the decision was that there had been a dedication by a private individual which was upheld, and the remarks of Osler, J., cited by the defendants, were *obiter dicta*. He is only dealing with the case where lands have been acquired for park purposes, not where they have been dedicated, and he says that even lands not dedicated can only be dealt with under sec. 637 of the Municipal Act where no one has acquired any rights in consequence of the action of the council. In this case Mary T. Smith and the other Island lessees, represented in the action, have taken and have also renewed their leases on the faith of these lands being park lands, and, therefore, even according to the decision *In re Peck and Town of Galt*, the city cannot alter the purpose for which these lands were set apart. Mary T. Smith bought her leasehold after the dedication. The Municipal Act does not apply for four reasons. (1) The land in question was not acquired for park purposes. (2) No by-law was passed for granting a lease to Lemon. (3) It cannot be shewn that the lands are no longer required for park purposes. (4) A park such as the Island Park can by no stretch of language come within the meaning of the class of communications designated in the Act as a "square." "Square" must be interpreted as *ejusdem generis* with the words in the same section 637 (1), roads, streets, squares, or other public commun-

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ications. In *Attorney-General v. Toronto*, 10 Gr. 436, the piece of land in question was only a public walk or square, it was a public communication, and not a park.

June 24. BOYD, C.:—I am not able to see my way clearly in this case to order an injunction as sought by the plaintiffs.

True it is that a by-law was passed in November, 1880, No. 1028, purporting to establish a park on the Island, and that certain lots were designated therein, including those now in question; and that these "together with such other lands as may hereinafter be obtained from lessees or otherwise shall be set aside, devoted to, and form a park."

Other lands were afterwards by by-law, in May, 1887, and November, 1887, directed to be taken and expropriated in order to enlarge the Island Park; yet the action of the city authorities was contemporaneously and for years at variance with the conclusion that these lots in question were regarded or treated as actually forming parts of an existing park.

Dealings as to these lots and this park seem to have gone on in a very haphazard way from year to year without any general plan or scheme having been adopted by the city. On the one hand it appears that many changes and alterations were required to adapt the locality so as to form a suitable park, in the way of filling up lagoons, building bridges, deepening channels, safeguarding dangerous places, planting trees, and otherwise changing the natural aspect and features of the place. These works were prosecuted in an uncertain and irregular way until lately; a special committee was appointed, in December, 1901, called the Island Committee, who are elaborating a plan of park improvements which will for the first time supply a definite policy to work upon from year to year.

On the other hand the city has treated the leases existing at the date of the first by-law in November, 1880, though then liable to forfeiture, as existing and valid leases under which rent has been paid on the whole lots down to 1883 or 1884 or perhaps later, and after that on parts of the said lots on which buildings or improvements have been made down to 1895, if not to the present time. Taxes have also been assessed upon

the said lots during the terms of the leases thereof, and have been paid to the city as an annual charge. Some 50 houses or structures, including a church building, have been erected upon the lots in question since 1880 till the present time. Plans have also been made with the sanction of the city and registered on certain of the lots on which streets are laid out, with reference to which trees have been planted and houses built, of which more special mention will now be made.

The details of lots in question and the leases thereof are set forth in the defence filed by the city and appear to be correct.

The Island (with certain reservations at present not important) was granted by the Crown, representing the Dominion Government, in fee simple, to the city of Toronto on the 26th June, 1867, and thereafter Murray's plan of the Island subdivided into lots was made and registered in 1873. Lots 56 to 58 depicted thereon shew more land than water, being made of strips of sand separating long bayous or lagoons running up from Block House bay.

After the by-law of 1880 there is registered in 1883 a plan of lot 59 (containing about 5 acres) sanctioned by the mayor and city's officials, whereby the lot is subdivided into sub-lots, eleven in number, lying between two avenues, the first opened up, called Pawnee avenue and Cherokee avenue, and the city's officers thereby authorize the subletting of the said lots by Wadsworth, lessee of the whole. Again, in 1890, there is registered a plan of lot 57 (of same dimensions, 5 acres) sanctioned by the then mayor and city officials, where it is subdivided into 23 smaller lots and intersected by two new avenues called Park avenue and Shiawassie avenue, with like permission to sublet given on behalf of the city. In 1898 this plan is, with the sanction of the city and under order of the county Judge, amended, and the situation of the streets changed, and Park avenue denominated Ongiara avenue. This plan also includes therein a part of lot 56 on the original plan of 1867.

There was a further subdivision into lots on the large lot 58 and a new avenue laid out called Mohawk avenue, on which the house of Mallon is built and that of the defendant Lemon is being constructed, but evidence has not been given of the date, or whether it is registered.

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On the 2nd April, 1902, the Island Committee recommended that a lease of part of lot 58 be granted for 21 years to Mr. Mallon, which was adopted by the council in the next month. His house has been built on an avenue called Mohawk avenue between Ongiara and Cherokee avenues as registered on the said plans.

On the 16th May the city solicitor drew the attention of the committee to the fact that lots mentioned in by-law 1028 have been leased by the city for residential purposes, and suggested that the by-law should be amended accordingly, and the committee thereupon recommended to council that it be amended so as to allow the city to lease for residential purposes all the land on the lake from between Manitou road and St. Andrew's avenue northerly to the proposed new roadway on the eastern boundary of Island Park, except street reservations. This was adopted, and on the 2nd June, 1902, was passed by-law 4168 amending by-law 1028 by striking out therefrom, as parts of Island Park, lots 56, 57, 58, 59, and 60, those now in question. And improvements are now under consideration, as shewn on a plan prepared by the city surveyor, utilizing these various avenues with a view to lease lots subdivided thereon, and proposing other changes in the site, embracing an area of over 300 acres, rather larger than originally contemplated.

It is in evidence by Mr. Sankey that he has known the changes in the Island since 1875, and he affirms that lots 56-60 were not regarded or dealt with as parts of the park, and that no complaint was made as to any of the plans registered or buildings put on the lots till last year. He says that the avenues marked on the plans are somewhat defined on the ground by two rows of trees planted on and towards the lakeside. Mr. Chambers, park commissioner, who has been in charge of the place since 1884, affirms that the line of demarcation between the lots in question and the park proper to the north was then marked by a row of stakes on line of 56-60, and he has located all north of these stakes as park and all south (*i.e.*, these lots) as not park.

Mr. Sankey's opinion is that the lands acquired under the by-laws of 1887 (Nos. 1824 and 1925) were of somewhat larger acreage than these lots now in question, and were intended as



substitutions to replace these lots withdrawn from the park scheme and yet keep the whole up to the area as originally contemplated in 1880.

The term used in intituling the by-law, to "establish a park," does not denote the idea of permanency or unchangeability. It indicates that much would be required in the particular locality to be done and with many intervening changes, before the park could take a fixed form and definite area. As said by the Court in *Osborne v. San Diego Co.* (1899), 178 U.S. 22, 38, it is manifest that to construe the word "establish" to mean "to fix unalterably," would throw the powers of the board into confusion and contradiction. See also *Magistrates of Dundee v. Morris* (1858), 3 Macq. 134, 166.

The right to expropriate for park purposes appears to be first conferred upon municipalities by the Act of 1887 (50 Vict. ch. 29, sec. 21) now R.S.O. 1897, ch. 223, sec. 576 (1 and 2).

The Act for establishing and maintaining public parks, first enacted in 1883, was not in force when this by-law was passed in 1880, but it shews the mind of the Legislature that the board of management shall have power to lease lands not immediately required for park purposes and may also sell the land if they find that they have more land than is required for park purposes (see R.S.O. ch. 223, sec. 13 (4 and 5)).

This corporation acted on the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rents and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners, though some regard for the enjoyment and benefit of the public has been always kept in view. The park scheme has not been abandoned, but the details, and the area of its occupation on the Island, have been modified from time to time by successive councils. If the city has the power to exercise such control, it is not for the Court to interfere, nor can the wishes of the residents on the Island control the situation as against the legislative and directory powers of the corporation. After the best consideration I can give, and in the absence of any distinct authority, my conclusion is, that the city has not exceeded its corporate or legislative powers in dealing as has been done with this Island Park. It

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does not appear to me that the doctrine of irrevocable dedication is applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee simple. The fact of corporate action being embodied in a by-law implies its revocability. Having enacted such a by-law to establish a park, the same body or its successors may repeal, alter, or amend as is deemed proper, so long as no vested right is disturbed: R.S.O. 1897, ch. 1, sec. 8 (37), and ch. 223, sec. 326.

This right, as applied to public places "dedicated" to the public out of corporate property owned by the municipality, is recognized by the Court, and has been based upon the reading of the statute in that behalf: R.S.O. ch. 223, sec. 637 (1). In *Attorney-General v. Toronto*, 10 Gr. 439, VanKoughnet, C., construes the statutory word "square" as meaning not merely an open space used as a means of a communication like a street, but as having the wide meaning inclusive of a park—an open or enclosed space devoted to such a use. This, though dedicated by a corporation, may be afterwards shut up or have taken from it its use and character as a park. That such was the decision is to be seen also from the observations of Mr. Justice Osler in *In re Peck and Town of Galt*, 46 U.C.R. at p. 219, where he says, "A square or park which the corporation lay out upon lands acquired by them . . . untrammelled by any trust as to its disposal, may be dealt with under the ample powers conferred upon them by section 509" (*i.e.*, of R.S.O. 1897, ch. 174), which is an earlier appearance of the present section 637.

The plaintiff Mrs. Smith claims under a lease made in 1874, which was renewed in 1897, though made to date back as from 1895, for which the term is for 21 years. The house originally built is occupied by her family now, and is about a quarter of a mile from the house being put up by the defendant Lemon, which is on the lot adjoining Mallon's house.

The evidence does not satisfy me that she has any such interest as gives her the right to appear as a private plaintiff. No special grievance, personal or proprietary, attaches to her, as owner on Manitou avenue, which is injured by the erection of the Lemon house. Besides, the original lease under which

she took was made in 1874, prior to the park scheme, and the renewal in 1895 or 1897 was after registration of the plans made in 1883 and 1890, shewing that the city had sanctioned the subdivision of lots 56, 57, and 59 into lesser lots for the purpose of being leased, and so incompatible with that locality possessing or being likely to possess the character of a park.

The joint information and action fails and should stand dismissed, but, as the motives of the relators and plaintiff are most commendable, I do not give costs if this ends the litigation. Should an appeal be lodged, however, then I think costs should be paid to the city as a proof of good faith in prolonging the controversy.

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## RE ASSELIN AND CLEGHORN.

July 31.

*Receiver—Equitable Execution—Judicature Act, sec. 58, sub-sec. 9—Property to be Reached—Book Debts—Shares in Foreign Company—Insurance Policy.*

The provision in sec. 58, sub-sec. 9, of the Judicature Act, R.S.O. 1897, ch. 51, that a receiver may be appointed in all cases in which it shall appear to be just or convenient that such order should be made, was intended merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone.

*Held*, that a judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another, assigned to the debtor.

OSCAR ASSELIN, one of the claimants in a carrier's interpleader, had recovered judgment in the interpleader against the other claimant, Thomas Henry Cleghorn, for \$239.97, and had placed in the sheriff's hands a writ of *fi. fa.*, which had been returned *nulla bona*.

Asselin moved for an order under the Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9, for the appointment of a receiver by way of equitable execution to receive the interest of Cleghorn in a policy of insurance on the life of Annie E. Cox, assigned to Cleghorn, and by him assigned to the Metropolitan Bank of Canada, and to receive the book debts owing to Cleghorn, and to receive and sell ten shares of stock in the A. Booth Fish and Oyster Company, owned by Cleghorn and by him assigned to the Metropolitan Bank of Canada, and all debts due or accruing due to Cleghorn from any source whatever, and all the interest that Cleghorn had in any property of whatsoever nature or wheresoever situate, all to be received subject to the claim, if any, of the Metropolitan Bank of Canada, and that the applicant, the judgment creditor, be appointed such receiver without security.

The motion was heard by MEREDITH, J., in the Weekly Court, on the 28th May, 1903.

*W. J. Elliott*, for the applicant.

*W. N. Tilley*, for the judgment debtor.



July 31. MEREDITH, J.:—The applicant's claim is by no means a modest one. It is, in effect, that he be appointed a sort of general assignee, for his own benefit only, of, substantially, all his debtor's property and earnings, and that the debtor be obliged to carry on business so that the applicant may have the earnings, until his debt is satisfied.

Such a mode of enforcing execution might be convenient for a creditor, but hardly so for a debtor and his family, and it certainly would not be just, or in the public interests.

It is strange that the introduction of the words "a receiver" may be "appointed . . . in all cases in which it shall appear to the Court to be just or convenient that such order should be made,"\* should have given such exaggerated notions to some creditors of new means of enforcement of their claims as seem to have prevailed among them: means by which they might acquire not only the property of the debtor usually seized under execution, but also every sort of property, right, or interest, no matter how remote or contingent, that he might have, as well as all that he might acquire until the debt was fully paid, including all sorts of rights of action.

There was no good excuse for such notions; they were but the offspring of rapacity. The law is reasonable in regard to enforcement of payment of debts; it does not permit of enslaving or casting into prison of honest debtors; it gives reasonable exemptions from seizure for the benefit of the debtor and his family, and safeguards his exigible property against needless sacrifice. On the other hand, it provides ample punishment for dishonest debtors.

It is not in the public interests, nor indeed really in a creditor's interest, that the debtor should be denuded of all that he possesses; all interests require that an honest debtor should not be deprived of the means of earning a livelihood and of all means of acquiring money to pay his debts. Too great rapacity in creditors may defeat rather than further their object.

It would be a reversal of the whole trend of modern legislation if the enactment before mentioned had any such wide-spread effect. The words quoted give no sort of real

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\* The Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9.

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encouragement to the notion. The purpose of them was, so far as they apply to such a case as this, merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone: see *Harris v. Beauchamp*, [1894] 1 Q.B. 801; *O'Donnell v. Faulkner* (1901), 1 O.L.R. 21; *Central Bank v. Ellis* (1896), 27 O.R. 583; *In re Harrison and Bottomley*, [1899] 1 Ch. 465.

Of the three classes of property specially aimed at in this application, none can be reached by that mode of enforcing payment of debts.

What is sought as to debts due and that may become due to the debtor, is virtually an assignment of them to the creditor for his own use until his debt shall be paid. It is plain that the enactment gives no such right. The debt sought to be reached must be a specific one, and if one which can be reached by attachment, the ordinary remedy should be adopted: see *Harris v. Beauchamp*, *supra*.

Nor can the capital stock in the foreign corporation be so reached; there is no means by which a sale and transfer of it could be enforced. The stock of a company incorporated in this Province can be effectually reached by execution; "The Execution Act" provides the means. Such legislation would not be effectual in the case of foreign corporations.

If there were power to reach the stock in question, much more information should be given as to it before the order sought should go.

And as to the life assurance contract, the weight of argument and of judicial opinion is also against the applicant. It is not a fully paid up policy. No means of meeting the premiums is suggested. It is not shewn that the underwriters would or could be compelled to accept the premiums from the applicant, if he were willing to pay them. To give effect to the application might be but to avoid the policy. It can hardly be convenient or just that that should be done or risked: see *Alleyne v. Darcy* (1855), 5 Ir. Ch. 56; *In re Sargent's Trusts* (1879), 7 L.R. Ir. 66; *Canada Mutual L. and I. Co. v. Nisbet* (1900), 31 O.R. 562; *Weekes v. Frawley* (1893), 23 O.R. 235.

The Court will not appoint a receiver where the effect may be merely the loss of the property or right; nor will a receiver be appointed unless it is reasonably clear that benefit will be derived from the appointment. The material in this case leaves the matter in altogether too much doubt: see *Hamilton v. Brogden*, [1891] W.N. 36, 35 Sol. J. 206; *O'Donovan v. Goggin* (1892), 30 L.R. Ir. 579; *I. v. K.*, W.N. 1884, p. 63; *Manchester and Liverpool District Banking Co. v. Parkinson* (1888), 22 Q.B.D. 173.

The policy in question cannot be considered to come within the meaning of the words "any money or bank notes . . . and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money," contained in sec. 18 of the Execution Act. It is not of the same nature as those mentioned, even if it can in any sense be deemed a security for money.

The application is refused with costs, to be set off *pro tanto* against the judgment.

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## [IN THE COURT OF APPEAL.]

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June 29.

## McLAUGHLIN v. MAYHEW ET AL.

*Vendor and Purchaser—Oral Contract for Sale and Purchase of Land—Specific Performance—Statute of Frauds—Part Performance—Possession—Note or Memorandum—Delivery of Deed in Escrow.*

Specific performance of an oral contract for the sale and purchase of land was adjudged at the suit of the vendee, who had gone into possession of the land on the faith of the contract and openly and continuously for some time remained in visible possession by his tenants, to the knowledge of the vendors and without objection on their part. It was considered that, under the circumstances, possession should be assumed to have been taken with the assent of the vendors, and the possession was of such a character as to exclude the operation of the Statute of Frauds.

*Quære*, whether a conveyance of land executed and delivered in escrow and retained in the vendor's own possession, to be handed to the vendee on payment of the purchase money, but not purporting to be made in pursuance of a previous agreement, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed.

*Gillatley v. White* (1870), 18 Gr. 1, and *Phillips v. Edwards* (1864), 33 Beav. 440, considered.

Judgment of Robertson, J., affirmed on the above ground.

AN appeal by the defendants from the judgment of Robertson, J., in favour of the plaintiff, in an action for specific performance of a contract for the sale of land by the defendants to the plaintiff.

The following statement of the facts is taken from the judgment of OSLER, J.A.:—The facts established by the evidence are briefly as follows. The defendants Fairy Lodge, No. 275, Independent Order of Odd Fellows, Huntsville, on the 16th June, 1900, being the owners of a vacant lot on the south side of Main street in the town of Huntsville, then vested in David Wilkinson, F. J. McCollum, and the defendant Oscar Weiler, as their trustees, passed a resolution authorizing "the trustees to sell the lot to the best of their ability."

On the 16th July, 1900, the defendants Whaley and Mayhew were elected and appointed trustees in the room and place of Wilkinson and McCollum, "who had retired from office," and on the 24th July, 1900, the three defendant trustees, acting in pursuance of the resolution of the 16th June, entered into a verbal agreement to sell the lot to the plaintiff for \$365. The plaintiff paid \$5 on account of the purchase money, and



the balance was to be paid on the delivery of the deed. It was expected that the agreement would be carried out at once, though time was not made of the essence of the contract. The defendants were told that the money would be placed in the hands of the plaintiff's friend, one Paget, to pay over as soon as the deed was ready; and he requested Paget to see that he got a deed in proper form. An instrument purporting to be a conveyance to the plaintiff in the usual form, bearing date the 24th July, was on that day, or a few days afterwards, prepared by one of the trustees, and signed by all of them, and produced to Paget for the plaintiff. Paget said it was necessary "to shew in the registry office that the new trustees had been appointed," and also that the deed should be under the seal of the defendant corporation. He had the residue of the purchase money in his hands ready to pay over on this being done. A certified copy of the resolution appointing the new trustees was prepared and signed by lodge officials, but, owing to the seal having been broken or injured, it was necessary to procure a new one. This was mislaid in the express office, and some delay occurred in consequence. Meantime the plaintiff, to the knowledge of the defendants, entered into possession of the lot, rented it for a month to two persons for the purpose of putting up thereon a "merry-go-round," and afterwards to several travelling medicine men, and received rent from the persons who thus occupied it.

In November, 1900, the collector of taxes for the year was referred by the trustees to the plaintiff for payment thereof, and he paid the same, and he was assessed for the lot as owner and occupier in the following year.

During the delay which occurred in procuring the new seal, the plaintiff had withdrawn the money from Paget's hands to use it for some other purpose, but when the deed and certified copy of the resolution were again produced duly sealed, the trustees were told that if immediate payment was required it would be made. They were content to let it remain at interest till called for, and this, as the trial Judge has found, was agreed to; the deed in the meantime to remain in the hands of the trustees. In April, 1901, the trustees, without further communication with Paget or the plaintiff, sold and conveyed the

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lot for \$380 to the defendant Reid, who purchased with notice of the plaintiff's title, and after the registration of the *lis pendens* in the action.

The defendants pleaded that there was no agreement in writing to sell the land, and relied as a defence upon the provisions of the Statute of Frauds.

The plaintiffs contended that the instrument executed by the trustees was a sufficient memorandum in writing of the contract, and, if not, then that the taking possession was a sufficient part performance of it to prevent the application of the statute.

The learned trial Judge found that there was a parol agreement between the parties, complete in all its terms; and that the instrument signed by the trustees was a note or memorandum thereof sufficient to satisfy the requirements of the statute. Specific performance thereof was accordingly adjudged.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 20th and 21st May, 1903.

*G. Lynch-Staunton*, K.C., for the appellant, on the question whether the deed was a sufficient memorandum in writing, referred to *Phillips v. Edwards* (1864), 33 Beav. 440; *Munday v. Asprey* (1880), 13 Ch. D. 855; *Kopp v. Reiter* (1893), 146 Ill. 437, 22 L.R.A. 273, and note; *McClung v. McCracken* (1882-3), 2 O.R. 609, 3 O.R. 596.

*W. H. Blake*, K.C. for the plaintiff, on the question of possession as part performance, referred to Addison on Contracts, 9th ed., p. 448; Agnew on the Statute of Frauds, p. 467. On the question as to the effect of the deed he cited Elphinstone on the Interpretation of Deeds, p. 122; Fry on Specific Performance, 3rd ed., sec. 505; *Blachford v. Kirkpatrick* (1842), 6 Beav. 232; *Gillatley v. White* (1870), 18 Gr. 1; *Martin v. Haubner* (1896), 26 S.C.R. 142; Encyclopædia of the Laws of England, vol. 4, p. 172; *Kelly v. Imperial Loan and Investment Co.* (1884), 11 A.R. 526.

*Lynch-Staunton*, in reply, as to the effect of the deed, cited *Cagger v. Lansing* (1871), 43 N.Y. 550; Reed on the Statute

of Frauds, vol. 1, sec. 388; and on the question of part performance, *Phillips v. Alderton* (1875), 24 W.R. 8; Fry, 3rd ed., sec. 580.

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June 29. The judgment of the Court was delivered by OSLER, J.A. (after stating the facts as above):—The question whether a conveyance executed, as the conveyance in this case was, in escrow (*Phillips v. Edwards*, 33 Beav. 440), and retained in the vendor's own possession to be handed to the vendee on payment of the purchase money, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed, is one of some nicety, having regard to the state of the authorities on the subject. It would appear to have been decided in the affirmative by Spragge, C., in *Gillatley v. White*, 18 Gr. 1. But in *Phillips v. Edwards*, *supra*, which was not cited in that case, the Master of the Rolls seems to have been of a different opinion, although its expression was not necessary, inasmuch as there was no complete parol agreement between the parties. The same observation applies to *McClung v. McCracken*, 3 O.R. 596, where *Gillatley v. White* is referred to without approval. The cases of *Moritz v. Knowles*, [1899] W.N. 40, reversed in the Court of Appeal, *ib.* 83, *Kopp v. Reiter*, 146 Ill. 437, 22 L.R.A. 273, *Freeland v. Charnley* (1881), 80 Ind. 132, and *Cagger v. Lansing*, 43 N.Y. 550, are also opposed to the plaintiff's contention although in these cases, also, there had been no antecedent parol contract complete in all its terms. On principle, where the conveyance relied upon contains no recital of the alleged agreement (see *Re Hoyle*, *Hoyle v. Hoyle*, [1893] 1 Ch. 84), there is some difficulty in maintaining the proposition that an instrument purporting to be an executed contract is evidence of a prior parol contract in the same terms. If the conveyance is the completion or execution of the parol agreement, then, as the Master of the Rolls says, the latter has ceased to exist and is merged in it, and the Court can look only at the terms of the deed. If not, the parol agreement is the matter which the Court is to enforce, and the terms of which it is to investigate. If the deed be delivered in

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escrow to an agent of the vendor or retained by the vendor himself until the performance of some condition, such as payment of the purchase money, in the absence of the statutory evidence of a prior agreement there would seem to be nothing to prevent the vendor, while the condition is unperformed, from recalling or cancelling it. See also Browne on the Statute of Frauds, 5th ed. (1895), sec. 354*b*; and Reed on the Statute of Frauds (1884), vol. 1, sec. 388.

In the case at bar there was a parol agreement as complete in all its terms as such an agreement can be, and the instrument at first executed and prepared by the trustees was inoperative as a conveyance of the estate, not being under seal, and perhaps for another reason. Its appearance indicates that it was not even under the seal of the trustees, though there is an expression in the evidence of Paget which is opposed to this. If that were the case, one of the difficulties suggested by the Master of the Rolls in *Phillips v. Edwards*, in the way of regarding it as being, in its former condition, a note or memorandum of the agreement, would be removed, and the recent case of *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84, shews what is the maximum required in the way of evidence of the parol agreement.

As at present advised, considering the evidence before us, I hesitate to affirm the judgment upon the ground on which the learned trial Judge has placed it, because the other ground on which the plaintiff relies, namely, the part performance of the agreement by entering into possession, is, in my opinion, well taken, and makes it unnecessary to consider the first point further. It is true that there is no evidence that at the time of making the agreement anything was said about taking possession, but it was an agreement intended to be carried out at once, and it was the fault of the defendants that it was not. It was expected that the difficulty—a formal one—which stood in the way of their doing so, would be immediately removed, and the plaintiff, having deposited the purchase money in the hands of a third person to be paid over, not unreasonably entered into possession of the lot. He did so on the faith of the contract, and openly and continuously for some time remained in visible possession by his tenants. There was



nothing equivocal about the possession thus taken. It was referable to the agreement, and to that only, and, being sworn and not denied to have been so taken and maintained, to the knowledge of the defendants, and without objection on their part, it ought, under the circumstances, to be assumed to have been taken with their assent. It was, I think, clearly of such a character as to exclude the operation of the statute. Fry on Specific Performance, 4th ed. (1903), secs. 601, 602, 603, and the cases of *Cameron v. Spiking* (1877), 25 Gr. 116, and *Ungley v. Ungley* (1876-7), 4 Ch. D. 73, 5 Ch. D. 887, may be referred to.

The judgment should be varied by directing a reference as to title, if the plaintiff desires it, but, subject to this, the appeal should be dismissed with costs.

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## [DIVISIONAL COURT.]

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July 18.

## REX V. LAIRD.

*Intoxicating Liquors—Liquor License Act—Powers of License Commissioners—Resolution Prohibiting Games of Chance on Licensed Premises—"Euchre"—Knowledge of Licensee—Conviction—Form—Distress—Imprisonment—Costs.*

A board of license commissioners, under the authority of the Liquor License Act, R.S.O. 1897, ch. 245, sec. 4, sub-sec. 4, passed a resolution "that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises:"—

*Held*, MACMAHON, J., dissenting, that the powers of the commissioners, under sec. 4, were not restricted by sec. 81, and that the resolution was within their powers.

Four persons played "euchre" for amusement in a room behind the bar of the defendant's hotel, the cards used being the property of one of the players, a boarder in the hotel :—

*Held*, that "euchre" is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge.

*Held*, also, that sec. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress, and, in default of distress, imprisonment, was authorized.

*Held*, also, that where the license inspector attends court as prosecutor he is to be allowed certain expenses by way of costs, as provided in sec. 117, and there was nothing wrong in the amount (\$4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction.

AN appeal by the license inspector for the south riding of the county of Oxford from the order or judgment of the Judge of the county court of Oxford quashing a conviction of the defendant by the police magistrate for the town of Ingersoll for an offence against a resolution of the license commissioners for the riding, prohibiting games of chance in licensed premises. The particular offence of which the defendant, a licensed hotel keeper, was convicted, was that of allowing the game of "euchre" to be played in his hotel.

The appeal was under sec. 120 of the Liquor License Act, R.S.O. 1897, ch. 245, and was heard on the 11th June, 1903, by a Divisional Court composed of BOYD, C., FERGUSON and MACMAHON, JJ.

*J. R. Cartwright*, K.C., for the appellant.

*T. A. Gibson*, for the defendant.

July 18. BOYD, C.:—The 3rd resolution forbids and prohibits playing games of chance in the licensed premises. The keeper of the house of entertainment took his license on this condition, and is responsible if it is disregarded. That it was disregarded by playing the game of euchre in a little room back of the bar on the afternoon of the 17th January, 1903, was found by the magistrate, and beyond doubt rightly so. Euchre is a well known game at cards, imported from the States, and it is a game of chance. The cards are shuffled, cut, and dealt to the players, and the hand held by each depends entirely upon chance. Those who know say that the cards beat all the players, be they never so skilful. Whatever adroitness may be contributed by the player, the words used by Mr. Justice Hawkins in reference to another game are doubtless aptly applied to this game of euchre: "It is a game of cards. It is a game of chance; and though, as in most other things, experience and judgment may make one player . . . more successful than another, it would be a perversion of words to say it was in any sense a game of mere skill:" *Jenks v. Turpin* (1884), 13 Q.B.D. 505, at p. 524.

The conviction was quashed by the County Court Judge on the ground that the license commissioners had no jurisdiction to pass the 3rd resolution in pursuance of sec. 4 of the Act (R.S.O. 1897, ch. 245), and also because they exceeded their jurisdiction, having regard to sec. 81 of the said Act.

The power of the commissioners under sec. 4 is not restricted by sec. 81. This last section is operative as a piece of substantive law against "gambling" in places licensed to sell spirituous liquors, which attaches to all such places irrespective of the resolutions of the commissioners. But, by the resolutions they pass, the commissioners may impose further safeguards to restrict gambling in licensed premises and games of chance which savour of gambling, and are so easily merged into gambling as to escape detection under cover of lawful pastime.

That this regulation is of such a character appears to be reasonably manifest. The power to regulate given by the Legislature to the board enables them to interfere with liberty of action to the extent deemed necessary to prevent disorder and abuse of liquor licenses—in other words, to make such

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provision as shall ensure the good government and orderly keeping of these licensed houses where liquor is sold. The scope of the resolution as to time and place is in line with sec. 81, but extends it to "games of chance" as well as "gambling." As said in *Regina v. Martin* (1894), 21 A.R. 145, the defendant accepted his license on these terms, and must see to it that these terms are observed. As observed by Mr. Justice Osler, the commissioners are substituted for the Legislature, and are authorized to make such regulations as they see fit in connection with the conduct of the traffic in intoxicating liquors. And the interference of the Court, he thinks, is only to be undertaken when they are clearly unreasonable.

Now, it is competent for the commissioners to prohibit all card playing on the licensed premises, whether of public guests or private friends of the proprietor, for fear lest unlawful gambling should be collusively carried on in any part of the licensed premises: *Patten v. Rhymer* (1860), 3 E. & E. 1. The commissioners may have had good reasons for prohibiting all games of chance being engaged in upon those premises where exceptional privileges are granted. The tendency of the game is likely to encourage people to hang round and to prolong their stay and to spend money in tipping or treating and to afford facilities to play for money or money's worth—so that the prevention of such games would, in their opinion, work more good than harm.

The English cases generally require that the element of betting be attached to the playing of cards before it can be called "gaming" in the legal sense, which is synonymous with gambling. But this putting up of money or money's worth is not aimed at in the resolution in question.

I note an early Virginia case of repute in which it was held that playing cards in a tavern is unlawful gaming, whether the party bets or not: *Commonwealth v. Terry* (1817), 2 Va. Ca. 77. And in more recent American cases the law is to the same effect. Playing cards, though not for money, in a private bedroom in an inn, is within a statutory prohibition against gaming in any inn: *McCalman v. The State* (1891), 96 Ala. 98; *Foster v. The State* (1887), 84 Ala. 451.



The prohibition is in a manner attached to the premises, and the landlord's ignorance does not afford an excuse. He gave orders to the bar-tender not to allow playing of cards in his absence, but his brother and others violated the well-known printed regulations which are exhibited in the most public part of the premises (see resolution 10), and the agent or servant of the proprietor failed in due oversight. The knowledge of the proprietor has not been made an element of the offence, and, if games of chance are played in the premises, the landlord is responsible, because he has undertaken in getting the license that they shall be protected: *Cundy v. LeCocq* (1884), 13 Q.B.D. 207, 210; *Collman v. Mills*, [1897] 1 Q.B. 396, *per* Mr. Justice Wright at p. 400.

There are some minor objections raised, *e.g.*, that the adjudication was varied by the conviction, and that the fine could only be enforced by distress, according to resolution 12 of the commissioners. The magistrate imposed a fine of \$10, and the 8th resolution says that the fine and penalty is to be recovered and enforced with costs by summary conviction . . . and enforced by distress as provided by law. Into this resolution is to be read the provision found in sec. 100 of the Liquor License Act, R.S.O. 1897, ch. 245, that where penalties are imposed for the infraction of a resolution of the board of license commissioners, the convictions in such proceedings may be in the form set forth in sec. 707 of the Municipal Act, R.S.O. 1897, ch. 223. Upon turning to that form, it will be found that for the recovery of the penalty by distress and in default of distress imprisonment, the conviction in hand follows the statutory form sanctioned by law.

There appears to be no valid objection as to the costs allowed, \$4.20. If the inspector attends Court as prosecutor, etc., he is to be allowed certain expenses by way of costs, as provided in sec. 117. There is nothing to shew anything wrong in the amount allowed. If it were wrong, it is clearly severable, and cannot affect the conviction as a whole.

Altogether, the conviction should be upheld as valid and the judgment quashing it reversed with costs to be paid by Laird, the respondent.

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FERGUSON, J.:—I concur in the judgment of the Chancellor.

MACMAHON, J.:—R.S.O. 1897, ch. 245, sec. 4, sub-sec. 4, empowers the boards of license commissioners to pass resolutions for, amongst other things, regulating the taverns and shops to be licensed.

Under the authority so conferred, the license commissioners for South Oxford, on the 23rd April, 1900, passed certain rules and regulations, the third clause of which reads:—

“Be it enacted that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises.”

In *Jenks v. Turpin*, 13 Q.B.D. 505, the proprietor of a club was convicted, under sec. 4 of 17 & 18 Vict. ch. 38, of keeping and using the house for the purpose of unlawful gaming; the committee of management had been convicted under the same section as persons assisting in conducting the business of the house so kept for the purpose of unlawful gaming.

Mr. Justice Hawkins said, in that case, at p. 524: “Since that statute (8 & 9 Vict. ch. 109) the only games made unlawful by 33 Hen. VIII. ch. 9, are games of dice or cards, whether such games were known at the time of the passing of that statute or have been since invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of *mere* skill), are in my opinion clearly within the meaning of the words “unlawful games” in 17 & 18 Vict. ch. 38. The language of the first section of 8 & 9 Vict. ch. 109, in referring to 33 Hen. VIII. ch. 9, and repealing only so much of it as applies to games of skill, is a strong indication of the intention of the Legislature that all the other games mentioned in the statute of Hen. VIII. were to continue to be treated as unlawful in the sense in and to the extent to which they were made unlawful by that statute, viz., unlawful if played *in a house kept for playing at them*. The *unlawful* games, then, now are,—ace of hearts, pharaoh, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of *mere* skill; and, I incline to add, any other game of mere chance.”

Whist has always been regarded as a game of skill, although an element of chance arising out of the dealing of the cards enters into it; and it is the same with euchre. And in *Regina v. Ashton* (1852), 1 E. & B. 286, a publican was convicted "for suffering an unlawful game called dominoes to be played in his house" against the tenor of his license, which made it a condition that the party licensed "do not knowingly suffer any unlawful games or any gaming whatever therein." No stake was played for. It was held that gaming does not consist in playing a game, but it consists in playing a game for money or some other valuable thing. And to play dominoes is not to game, but to play it for money is gaming.

In the case of *Patten v. Rhymer*, 3 E. & E. 1, an innkeeper had invited some friends to come as guests and play cards, which they did after prohibited hours. They played for money, and he was convicted of having permitted gaming on his licensed premises, contrary to a condition of his license.

In *Rex v. Rogier* (1823), 2 D. & R. 431, Mr. Justice Best, at p. 436, said: "No game is unlawful in itself, but every game may be rendered so by playing at it for an excessive stake; for it is the amount played for, and not the name or nature of the game, which is the essence of it, and which constitutes it an offence in the eye of the law." And Mr. Justice Smith, in *Jenks v. Turpin*, *supra*, at p. 532, said that what was laid down by Best, J., in *Rex v. Rogier* was still good law, and therefore common sense, even although the statute of Anne against excessive gaming had been repealed.

As pointed out in the judgment in *Jenks v. Turpin*, at p. 513, if games are played in a common gaming house as part of the unlawful business thereof, such gaming would be unlawful, though the games in themselves were not so.

In Bacon's Abridgement, tit. Gaming (A), is this statement: "It seems that by the common law, the playing at cards, dice, etc., when practised innocently and as a recreation, *the better to fit a person for business*, is not at all unlawful, nor punishable as any offence whatever." Mr. Justice Hawkins, commenting on this passage, in *Jenks v. Turpin* (*supra*), at p. 517, says: "The writer only intended to state generally that innocent play was perfectly lawful, and not to leave it to be inferred that at

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*common law* to play at dice otherwise than for recreation was unlawful."

The evidence before the magistrate in the present case shews that four persons were playing euchre for amusement in a room behind the bar of the defendant's hotel, the cards used being the property of a boarder in the hotel, who was participating in the game. If, therefore, it could be held that the commissioners had authority to pass the rule against playing a game of chance for amusement, then it would cover a case where the license holder and his wife and two friends met in the parlour or any other room of the hotel and played a game of whist or euchre for amusement; or to a case where four guests at the hotel met in a room occupied by one of them and played either of the games mentioned for amusement.

In *Regina v. Martin*, 21 A.R. at p. 148, Mr. Justice Osler said: "The license commissioners . . . are authorized to make such regulations as they see fit in connection with the conduct of the traffic in spirituous liquors. It may be that they might attempt to make regulations so clearly unreasonable as to justify the interference of the Court."

I think that the regulation which prevents the playing of a game of whist or euchre for amusement in licensed premises is not a reasonable regulation, and therefore one which the commissioners were not empowered to make.

In my opinion, the conviction was invalid, and the judgment of the learned County Court Judge quashing it should be affirmed with costs.

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## [IN THE COURT OF APPEAL.]

TORONTO RAILWAY CO. V. CITY OF TORONTO.

TORONTO ELECTRIC LIGHT CO. V. CITY OF TORONTO.

INCANDESCENT LIGHT CO. OF TORONTO, LIMITED V. CITY OF  
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OTTAWA ELECTRIC CO. V. CITY OF OTTAWA.

OTTAWA GAS CO. V. CITY OF OTTAWA.

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## \*ASSESSMENT APPEALS.

*Assessment and Taxes—Street Railway Companies—Electric Light Companies—  
“Rolling Stock, Plant, and Appliances”—Construction of Statute—Ejusdem  
Generis—2 Edw. VII. ch. 31, sec. 1 (O.)—R.S.O. 1897, ch. 224, sec. 18.*

The statute 2 Edw. VII. ch. 31, sec. 1, amending section 18 of the Assessment Act, R.S.O. 1897, ch. 224, provides by sub-sec. 3 for the assessment as “land” of “the rails, ties, poles, wires, gas and other pipes, mains, conduits, substructures and superstructures” of companies of the kind referred to in the section,—“upon the streets, roads, highways, lanes and other public places of the municipality,”—and by sub-sec. 4, that “save as aforesaid, rolling stock, plant and appliances” of such companies “shall not be ‘land’ within the meaning of the Assessment Act, and shall not be assessable” :—

*Held*, that upon the proper construction, this means that the rolling stock, rolling plant, and rolling appliances of such companies, which is found and used on the streets, etc., shall not by reason merely of the wide words “substructures and superstructures” in sub-sec. 3, be liable to assessment as “land” save as mentioned in sub-sec. 3.

There is no intention to exempt the companies in question from assessment in respect of such of their plant and appliances, as is otherwise “land” within sub-sec. 9 of sec. 2 of the Assessment Act, but is not on the streets, etc.

*Held*, also, that the lamps, hangers, and transformers of an electric light company, though easily transferable from one place to another, were “superstructures” upon the street within the meaning of sub-section 3.

THESE were appeals by the following companies, namely :—  
The Toronto Railway Company, The Toronto Electric Light Company, The Incandescent Light Company of Toronto, The Ottawa Electric Company, and The Ottawa Gas Company, under sec. 84 of the Assessment Act, R.S.O. 1897, ch. 224, from decisions of a board of county judges, and the principal question involved in all of them, was as to the proper construction of sec. 18, sub-secs. 3 and 4 of the Assessment Act, as substituted for the former sec. 18 of that Act, by the Assessment

\* See now 3 Edw. VII., ch. 21, sec. 7 (O.).

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Amendment Act of 1902, 2 Edw. VII. ch. 31.\* The city of Toronto was the respondent in the cases of the first three companies, and the city of Ottawa in that of the last. There was also an appeal by the city of Ottawa as against the Ottawa Electric Company.

The appeals were argued together on May 14th and 15th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

*James Bicknell*, K.C., and *J. Bain*, for the Toronto Railway Company.

*H. O'Brien*, K.C., and *G. S. Lundy*, for the Toronto Electric Light Company, and the Incandescent Light Company of Toronto.

*A. B. Aylesworth*, K.C., for the city of Ottawa.

*G. E. Henderson*, for the Ottawa Electric Company and the Ottawa Gas Company.

*J. S. Fullerton*, K.C., and *W. C. Chisholm*, for the city of Toronto.

It was contended on behalf of the companies, appellants, that the intention of the Legislature was that in the case of such companies as they were, the dividends should be assessed, rather than the personal property of the companies; that sec. 1, sub-sec. 4, of 2 Edw. VII., ch. 31, meant that, save as specifically provided in the foregoing sub-sections., rolling stock, plant, and appliances, should not be land within the meaning of sec. 2 (9) of the Assessment Act, R.S.O. 1897, ch. 224, but should be treated as personal property, and come within sec. 39; that the Legislature had considered it fairer to tax the dividends, subject to this that it taxed a specific part of the rolling stock, plant and appliances, because it is on the streets; that thus sub-sec. 4 modified the definition of what was personalty; that experience had shewn it was better and fairer to base taxation on the earning power of the machinery, rather than on the machinery itself; that the intention was that personalty was to remain personalty, save so far as made realty by sub-sec. 3; and that in construing a statute imposing a tax, it should be construed strictly and in favour of the person taxed: Am. and Eng. Ency.

\* For the provisions of these sub-sections see the judgment of Osler, J.A.

of Law, vol. 23, p. 420; Beal on Legal Interpretation, p. 131; Cooley on Taxation, 2nd ed., p. 296. The following were also cited: *The Toronto Street R. W. Co. v. Fleming* (1875), 37 U.C.R. 116; *The Consumers' Gas Co. of Toronto v. The Corporation of the City of Toronto* (1895-7), 26 O.R. 722, 23 A.R. 551, 27 S.C.R. 453; *Taylor v. Corporation of Oldham* (1876), 4 Ch. D. 395; Houston's Dictionary of Electrical Words, *sub v. 'Plant.'*

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For the city of Toronto and the city of Ottawa it was contended that the amendment to the Assessment Act was not intended as an exemption clause at all; that the meaning of sub-sec. 4 would have been clearer if "save as aforesaid" had been placed at the end of it, but that these words referred to the whole Assessment Act, and not merely to the provisions of the section: that there is nothing repealing sec. 2, sub-sec. 9 of the Assessment Act in sec. 1 of 2 Edw. VII., ch. 31, and a construction should be adopted which would leave sec. 2, sub-sec. 9 in force; that all exemptions are to be strictly construed; and that by adopting the rule of *ejusdem generis* to plant and appliances in sub-sec. 4 all difficulty is removed. The following cases were cited: *In re Toronto Railway Company Assessment* (1898), 25 A.R. 135; *In re London Street R. W. Co. Assessment* (1900), 27 A.R. 83; *In re Queenston Heights Bridge Assessment* (1901), 1 O.R. 114; *In re Toronto Electric Light Company Assessment* (1902), 3 O.L.R. 620; *Kirkpatrick v. Cornwall Electric Street R. W. Co.* (1901), 2 O.L.R. 113; Maxwell on Interpretation of Statutes, 3rd ed., p. 468; Hardcastle on Statute Law, 3rd ed., p. 192; *Seaward v. Vera Cruz* (1884), 10 App. Cas. 59 at p. 68; *Kutner v. Phillips*, [1891] 2 Q.B. 267, at p. 271; Cooley on Taxation, 2nd ed., p. 205.

In reply it was contended that sub-sec. 4 of sec. 1, 2 Edw. VII., ch. 31, spoke of what should not be land, and not be assessable, whether on the street or off the street; that what it refers to is not confined to property on the street, as the board of Toronto judges held; that if 'plant and appliances' in sub-sec. 4, mean only the 'plant and appliances' in sub-sec. 3, there is nothing for sub-sec. 4 to apply to: *per* BURTON, J.A., in *In re The Bell Telephone Company and the City of Hamilton* (1898), 25 A.R. 351, at pp. 352-3; *Cox v. Rabbits* (1878), 3 App. Cas. 473; *Anderson v. Anderson*, [1895] 1 Q.B. 749, at

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p. 752; Hardcastle on Statute Law, 3rd ed., pp. 126, 336-8, were referred to.

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June 29. OSLER, J.A.:—These are appeals by the various companies, under sec. 84 of the Assessment Act, from decisions of a board of county judges, and one question common to all of them is as to the proper construction of sec. 18, sub-secs. (3) and (4) of the Assessment Act as substituted for the former sec. 18 of that Act, by the Assessment Amendment Act, 1902, 2 Edw. VII., ch. 31, sec. 1.

The new section is a further attempt to settle some of the difficulties arising out of former legislation upon the same subject, and it must be said that it has been so expressed as to raise, in more than one respect, plausible doubts of its own meaning. Sub-secs. (1) and (2) provide, first, generally as to land, where it shall be assessed; and, second, specially as to the land of certain companies, as follows: (2) "The land of companies for supplying water, heat, light and power to municipalities and the inhabitants thereof, telephone companies, telegraph companies, and companies operating street railways and electric railways, shall, in municipalities divided into wards be assessed in the ward where the head office of such company is situated if such head office is situated in such municipality, but if the head office is not in such municipality then the assessment may be in any ward thereof."

Sub-section (3) then provides as to certain kinds of property of the companies mentioned in sub-section (2), that;

"The rails, ties, poles, wires, gas and other pipes, mains, conduits, substructures and superstructures *upon the streets, roads, highways, lanes and other public places of the municipality* belonging to such companies shall be 'land' within the meaning of the Assessment Act, and shall when, and so long as in actual use, be assessed at their actual cash value, as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises in and from the municipality, and subject to similar conditions and burdens, regard being had to all circumstances adversely affecting their value, including the non-user of any such property."



Pausing here, it will be seen that the definition of "land," "real property" and "real estate" in sec. 2, sub-sec. (9) of the Assessment Act, is not affected. These are, so far, merely extended or explained by the new enactments. They "include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty," and therefore all such property of any such company not upon the streets, roads, highways, lanes and other public places of the municipality, would remain assessable as heretofore, or as now provided for by sub-sec. (2) of the new Act.

Then comes the sub-section which causes the principal difficulty: (4) "Save as aforesaid, rolling stock, plant and appliances of companies mentioned in sub-section 2 hereof, shall not be "land" within the meaning of the Assessment Act, and shall not be assessable."

The contention of the companies is that the effect of this language is to exempt from assessment all their plant and appliances of every description, though otherwise land within the meaning of sub-section 9, sec. 2 of the Act, and hitherto undoubtedly assessable as such, which is not upon the streets of the municipality. It is hardly necessary to point out how novel and extensive an exemption is sought to be introduced by this construction, nor how clear must be the words which should compel us to adopt one so opposed to the general principles of the Assessment Act.

We can see from the terms of sub-sec. 3, read in the light of former legislation and the decisions of the court, that its main purpose is to provide for the assessment of the street property of these companies.

Before the passage of the Act of 1962, 2 Edw. VII., ch. 31, rails ties, poles, wires, gas and other pipes, mains, conduits, and probably as included in these words, any other substructures and superstructures upon the streets and highways of a municipality, belonging to companies mentioned in the 2nd sub-sec. of the new sec. 18, had been held to be land within the meaning of the Assessment Act, and assessable as such. The first branch of sub-sec. 3 therefore merely affirms the existing law. The difficulty was as to the mode of assessing such property, and it

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is this difficulty which is sought to be remedied by sub-sec. (2), and the second branch of sub-sec. (3).

The rolling stock of electric railways had also recently, for the reasons given in *Kirkpatrick v. Cornwall Electric Street R. W. Co.*, 2 O.L.R. 113, been held assessable as land within the meaning of sec. 2, sub-sec. 9, of the Assessment Act, as being something forming part of the realty.

No one has ever contended that plant and appliances in the nature of fixtures, or forming part of the realty belonging to any such company, situated on their own grounds, or in their head offices building, or elsewhere than on the streets, were not assessable. It is contended that by force of sub-sec. (4) of the new sec. 18, not merely rolling stock of street and electric railways, but all plant and appliances of those railways and of all other companies mentioned in sub-sec. 2, elsewhere than on the streets, though apart from such sub-section they would be assessable as land, shall be exempt from taxes and shall not be land or assessable as such. What the legislature intended to remedy is very plain. The question is whether in applying the remedy they have used language which must be read as creating a new and general exemption of property the liability of which to taxation has never been disputed. No doubt the language used goes far to create this new difficulty, and if it is not fairly capable of being read otherwise than as the appellants contend for, we must so construe it, no matter how extravagant and unjust the result we may be forced to.

"Rolling stock, plant and appliances"—are these generic terms meaning the rolling stock of the railway companies, and also the plant and appliances of the railways, and of all the companies, other than that included in sub-sec. (2)? Or are we to apply to them the well known rule of construction, and read plant and appliances as *ejusdem generis* with rolling stock? I am of opinion that the case is one for the application of that rule. It is intended by sub-sec. (4) to make it clear that the rolling stock of the railway companies' plant which is found and used on the streets—shall not by reason of the wide words "sub-structure" and "superstructure" used in sub-sec. (3) be liable to taxation as land. The intention was to undo the effect of our decision in the *Kirk-*

*patrick* case ; and to declare that such rolling stock shall not be, as up to that time it had not been, liable to taxation. The general words plant and appliances, which follow the particular specific term "rolling stock" ought in my opinion to be read as restricted to the same genus as the latter, the whole having the meaning of rolling stock, rolling plant and appliances, such as tools in connection with or belonging to such stock. I see nothing to forbid such a construction, and a very great deal to commend it having regard to what we know of the evil intended to be remedied by the legislation, and the novel and extraordinary results which would flow from a contrary construction. But it is said that to confine the meaning of the sub-section in this manner is to make it of no force as regards companies which have no rolling stock, but have plant and appliances of a different kind, elsewhere than on the street. The answer is that the words "companies" in sub-sec. (4) is to be read distributively. The sub-section is not in terms applied to *all* the companies mentioned in sub-sec. 2. Its language is rolling stock, plant and appliances of companies mentioned in sub-sec. (2), that is to say of companies which have such rolling stock.

If I am right in saying that the general rule of construction I have mentioned is *primâ facie* applicable to this collocation of terms, we ought not to construe them otherwise merely because the effect of doing so will give them no application to the other companies unless the language of the sub-section in other respects shews that the latter were meant to be comprehended, which I think is not the case. The principal ground of appeal therefore, in my opinion, fails.

A further objection was taken by the Ottawa Electric Company that their lamps, hangers and transformers, were not "superstructures upon the street" within the meaning of sub-section (3). I have felt some doubt on this point. The company in which that word is found seems to require its limitation to something fixed and permanent in its nature, as much so as "sub-structures" and poles, wires and mains. Lamps, hangers and transformers, are more aptly described, if I understand their connection with the equipment, as apparatus, though no doubt, in one sense, structures, as every mechanical contrivance

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is the parts of which are assembled to make it. Nevertheless, they form, however easily removed and transferable from one place to another, parts of the permanent and essential street plant.

My learned brothers agree with the finding of the board of county judges, and I cannot, with any confidence, come to a different conclusion.

As regards the appeal of the city of Ottawa in respect of the Gas Co.'s assessment, I cannot see on the evidence any reason to interfere with the amount to which the board of judges reduced it.

I must add, that in these assessment appeals, where the parties contemplate carrying them beyond the board of county judges, more care should be taken to have the evidence before the board reported, and the contentions of the parties properly formulated there, than has been done in some of the matters brought before us.

MACLENNAN, J.A.:—These were assessment appeals brought by the respective companies from decisions of two boards of county judges, and the most important question involved being the same in all the cases, they were argued together.

That question was whether the Act 2 Edw. VII. ch. 31, sec. 1, sub-sec. 4, had the effect of exempting the appellants from assessment in respect of their buildings and improvements other than those upon the streets, roads, highways, etc., as mentioned in sub-sec. 3.

The learned judges all held that the sub-section had not that effect and gave judgment accordingly.

I am of opinion that the judgment is right.

I have but little to add to the reasons of the learned county judges. In my judgment sub-secs. 3 and 4 are to be read together, and the words *save as aforesaid* in sub-sec. 4 afford the key to the construction of that section. What is aforesaid, relates to 'properties upon the streets, roads, highways, lanes, and other public places of the municipality, belonging to such companies.' As to these it is declared they shall be *land*, within the meaning of the Assessment Act, and shall be assessed as particularly described. Then comes sub-sec. 4, and declares



that save as aforesaid certain other properties shall *not* be land within the meaning of the Assessment Act, and shall not be assessable, viz.: rolling stock, plant, and appliances, that is to say, rolling stock, plant and appliances, on streets, roads, highways, etc. I think that is the natural and only sound construction of the language used, and the only construction allowable upon the authorities on the exposition of statutes. But I am also of opinion that the word "*rolling*" qualifies the word "*plant*" as well as the word "*stock*." The former expresses quite as well as the latter things mounted and moving on wheels, the property of companies such as railways; and in both the Standard and Century dictionaries are to be found the words "*rolling plant*," as meaning the same thing as "*rolling stock*," and as distinguished from fixed stock or plant and other movable property. I think also the word "*appliances*" is to be qualified by the word "*rolling*," and means the same kind of things.

On their appeal before the court of revision the Ottawa Gas Company contended for a reduction in the valuation of their mains and services from \$75,000 to \$56,800, but the assessment was confirmed. The board of judges, however, reduced it to \$65,600. In their reasons of appeal to this court the company declared that they did not appeal further on that point, being satisfied with the amount to which the assessment was reduced by the board of judges. Counsel for the company, however, did not adhere to that position before us, but renewed the contention for a further reduction, and was allowed to do so without objection by counsel for the respondent. It was urged that the evidence required a further reduction to be made, and that there was no evidence to the contrary. It does not appear on what grounds the learned judges either made the reduction which they did make, or refused to make the further reduction claimed by the appellants. But, having regard to the evidence they may very well have thought it reasonable to discount some of the large percentages which the witnesses applied by way of reduction of the values of the different species of the property, including a final reduction of 20% from the aggregate. They may also very well have considered it not right to deduct the whole value of the 2,000 unused services

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on asphalted streets, amounting to the large sum of \$11,000. These services, as I understand, are put down provisionally in asphalted streets, so that the streets may not require to be torn up when new services are required. These services, although not in use, are worth all they cost, and not at all like property which has gone out of use. What the statute says is that when and so long as in actual use they shall be assessed at their actual cash value as the same would be appraised, etc., regard being had to all circumstances adversely affecting their values, including non-user. Now, it cannot be said that these unused services would be of no value upon a sale, nor that their value would be very much less than their original cost, nor can it be said with truth that they are not in use. They were put down for a particular purpose, namely, to save future trouble and expense, and they are serving that purpose. I do not think the valuation of the learned judges should be interfered with.

It was also contended that the sum of \$52,000 to which the value of the company's buildings and improvements had been reduced by the board of judges should be further reduced to a nominal sum, as being of no value apart from the company's franchise. I have read the evidence, and I do not find any on which we would be justified in making any further reduction.

The Ottawa Electric Company was assessed for their land apart from buildings and improvements, about which there is now no question, and for their buildings and improvements, other than poles, wires, etc., to the value of \$145,000; and for poles, wires, etc., \$125,000. That assessment was confirmed by the court of revision, and both parties gave notice of appeal to a board of county judges. The city's appeal was afterwards abandoned. One of the grounds of the company's appeal is that which has already been disposed of in the Toronto cases, namely, that the company's plant and appliances, other than that upon streets, etc., was exempt by virtue of sub-sec. 4 of the Act of 1902. The other grounds of the company's appeal were that the value of \$125,000 placed upon buildings and improvements upon lot M on the south side of Head street, and also the value of \$125,000 placed upon the company's poles, wires, etc.,

were excessive. After hearing the evidence of several witnesses the learned judges reduced the value of the buildings and improvements on lot M to \$67,500, and they confirmed the assessment of the poles, wires, etc., at \$125,000.

It was contended before us that the value of \$67,500 should be further reduced to \$43,600, and that the valuation of the poles and wires should be reduced by deducting the value of arc lamps and transformers, which, although upon the streets, it was said were not superstructures, and that at all events, upon the evidence, there should be a reduction of \$100,000.

I am of opinion that it cannot be held that the lamps and transformers are no part of the superstructure upon the streets within the meaning and intent of the statute, and having read the evidence I am unable to see that any further reduction of value ought to be made.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

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## [DIVISIONAL COURT]

D. C. MATHEWS v. THE CORPORATION OF THE CITY OF HAMILTON.

1903

June 4.

*Municipal Corporations—Liability for Nuisance—Discharging Hot Water down Sewers into Navigable Waters—Vessels Moored for Winter—Special Damage.*

The defendants' sewer emptied into navigable water at the end of one of their streets, in which water the plaintiff's vessel was lawfully moored for the winter. The defendants, although notified of similar consequences having previously happened, allowed a factory to send hot water down the sewer, which melted the ice on the easterly side of the vessel, causing her to fall away on that side, so that the oakum packing in her seams, remaining frozen to the ice on the west side was torn away, the seams opened, and water was let in, whence damage resulted:—

*Held*, that the defendants were liable, as the plaintiffs were lawfully using the waters, and the discharge of the hot water was, under the circumstances, a public nuisance; and the plaintiff having suffered special damage therefrom, were entitled to recover against the defendants.

APPEAL by the defendants, the corporation of the city of Hamilton, from a judgment of the Judge of the county court of Wentworth in favour of the plaintiffs, in an action for damages brought under the circumstances stated in the head-note, and in the judgment of Street, J. The judgment appealed from was as follows:—

SNIDER, Co.J.:—In my opinion the evidence proves that a vessel laid up for winter suffers no damages from being frozen in solidly all round if it drags on nothing—that is, the ice being on all sides, and being allowed to thaw away in the ordinary course of nature. The evidence also shews that a vessel will winter as safely in open water, or where only thin ice forms occasionally. But in this case, after the vessel was frozen in with very heavy ice all round her, the hot water from the cotton mills was turned into this slip by defendants, through their Simcoe street sewer, in March, 1901, and thawed this heavy ice away on one side of the vessel only.

When the current of hot water struck her, the dragging weight of the vessel or the wind then tore her away from the heavy ice on the other side, the ice taking with it the oakum out of the seams, thereby causing the serious leak and damage which ensued. The defendants had been notified that the same



cause had produced the same result before, and on complaint had ceased for some years to run this hot water down Simcoe street sewer in winter. They had been again requested, for the same reason, in the winter of 1900-1901, not to turn it into the bay through this sewer. They had the means provided to send it elsewhere, but at greater cost; and to save some additional expense of pumping at the disposal works, turned it into this sewer. I find that they thereby caused the damage complained of in this action.

After examining the authorities cited, I have concluded that the defendants, by running this hot water into the bay at this point have committed a nuisance, from which the plaintiffs have suffered special damages, the amount of which is not questioned, and exceeds \$200. I therefore direct judgment to be entered for plaintiffs for \$200 damages, with costs of the action.

The appeal was argued before the Divisional Court (STREET and BRITTON, JJ.) on April 15th, 1903.

*F. Mackelcan*, K.C., for the defendants, contended that the defendants and not the plaintiffs being riparian owners, the matter was *damnum absque injuria*: *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, 671-684; *Smith v. Kenrick* (1849), 7 C. B. 515, 564; *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25, 33, 38, 48; *Giles v. Walker* (1890), 24 Q. B. D. 656; Broom's Common Law, 9th ed., pp. 72-82; Ency. of Law of England, vol. 6, p. 486; that the city had a right to build a wharf to navigable water: Am. & Eng. Enc. of Law, vol. 29, pp. 65, 72; and also to discharge a sewer into its own water-front: *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713, 717, 720; that the plaintiffs were mere volunteers or intruders in leaving their vessels for the winter in the defendants' water-front: Gould on Waters, 3rd ed., secs. 88-91; *Cram v. Ryan* (1894), 24 O. R. 500, 504; in appeal, 25 O. R. 524; that at anyrate the plaintiffs had no paramount right there which the defendants had invaded; that sewers would be useless if only cold water might pass through them.

*E. H. Ambrose*, for the plaintiffs, contended that the street ending in the water-front in question was a public street, and

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the defendants had no such rights over the latter as claimed; that a municipality has no right to discharge a sewer into navigable water so as to cause injury: Am. & Eng. Ency. of Law, 2nd ed., vol. 10, p. 248; *ib.* vol. 21, p. 442; that this amounted to interfering with the navigation, for ships must lie up, as here, during the winter: Wood on Nuisances, 2nd ed., sec. 487, p. 566; that navigation is not confined to summer months: *Cullerton v. Miller* (1894), 26 O.R. 36; *McDonald v. Lake Simcoe Ice Co.* (1899), 26 A.R. 411, at p. 416; *Lake Simcoe Ice and Cold Storage Co. v. McDonald* (1901), 31 S.C.R. 130, 133; *People's Ice Co. v. Steamer "Excelsior"* (1880), 44 Mich. 229; that the plaintiffs had the right to have the water left in its natural state, and to a reasonable use of it: *Mason v. Hill* (1833), 5 B. & Ad. 1; and that the city had full notice of the injury that would result.

*Mackelcan*, in reply, contended that the defendants had as much right to empty the water into the slip, as the plaintiffs had to back their vessel up into it; and referred to *Atwood v. Bangor* (1891), 83 Me. 582, 585; *Franklin Wharf Co. v. City of Portland* (1877), 67 Me. 46; *Darling v. City of Bangor* (1878), 68 Me. 108.

June 4. STREET, J.:—The defendants, the municipal corporation of the city of Hamilton, have a sewer which empties into Burlington Bay, at the end of one of their streets, called Simcoe street, which was laid out many years ago by the late Sir Allan Napier MacNab. The plaintiffs have a wharf running out from land of their own, on the west side of Simcoe street, into the bay, and this wharf has been used by them for many years in connection with a steamboat or steamboats owned by them. During the winter months their steamboat is moored to the east side of their wharf, and remains frozen in until the breaking up of the ice in the spring. A short distance above the mouth of the sewer is a large cotton factory, from which large quantities of very hot water are discharged at intervals into the sewer, and, by means of the sewer, into the bay, close to the plaintiffs' wharf. The result is that ice, which has formed about the plaintiffs' steamboat lying moored to the wharf, melts on the outward or easterly side of the

vessel, while that between the vessel and the wharf does not. Being attached to the ice on the west, and freed from it on the east, the vessel falls away to the east, and the oakum packing in her seams on the west side, remaining frozen to the ice, is torn away, the seams are opened, and water is let in, which causes the damage complained of.

In my opinion, the learned Judge below is right in his view of the law affecting the question in dispute.

The defendants have the right to discharge water from their sewers into the bay, provided they do not interfere with the rights of persons lawfully using the waters of the bay. The plaintiffs were lawfully using those waters in mooring their steamboat at their wharf during the winter months. The evidence clearly establishes damage to the plaintiffs caused by the discharge from the defendants' sewer into the bay of the hot water in question, by the effect of which the ice forming about the plaintiffs' vessel was affected, and the safety of the vessels mooring was interfered with.

The discharge of this hot water into the bay was, under the circumstances, a public nuisance, and the plaintiffs having received special and peculiar damage from it, are entitled to maintain this action: *Am. & Eng. Ency. of Law*, vol. 10, 2nd ed., p. 248; *ib.*, vol. 21, p. 442; *Wood on Nuisances*, 2nd ed., sec. 480; *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713; *McDonald v. Lake Simcoe Ice Co.*, 26 A.R. 411, at p. 416; 31 S.C.R. 130, at p. 133; *Ellis v. Clemens* (1891), 21 O.R. 227.

The appeal should be dismissed with costs.

BRITTON, J.:—I agree that plaintiffs were lawfully using the navigable waters of Burlington Bay in mooring their steamer to the wharf at the foot of Simcoe street, in Hamilton, during the winter season. We can not interfere with the finding of fact by the learned trial Judge that the damage was caused in the manner described, by the hot water flowing through defendants' sewer into the bay. It is going very far to hold that permitting this hot water to enter the sewer and flow to the frozen waters of the bay, is an unreasonable use to make of the sewer. In the absence of notice to the defendants that such an injury, as is complained of, would result, I would

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not hold defendants liable. Such a result as plaintiffs have proved in this case is something entirely out of the ordinary, and could not reasonably be expected from hot water emptied into the bay, as this was.

There was, however, in this case express notice to the defendants. And the defendants for a time desisted, but afterwards permitted what is complained of, and the plaintiffs were thereby injured; and so are entitled to recover.

A. H. F. L.

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## [IN THE COURT OF APPEAL.]

## RE LENNOX PROVINCIAL ELECTION.

## PERRY V. CARSCALLEN.

C. A.

1902

Dec. 12.

1903

March 3.

*Parliament—Controverted Elections—Disagreement of Trial Judges on Charge of Corruption—Right of Appeal—The Ontario Elections Act, R.S.O. 1897, ch. 9—The Controverted Elections Act, R.S.O. 1897, ch. 11.*

The Judges at the trial of an election petition having reserved judgment in respect of five charges, subsequently dismissed four of them, both Judges agreeing as to the result. As to the fifth charge—payment of money by the candidate to a voter to induce the latter to vote for him—the Judges disagreed; one being in favour of the dismissal of the charge; the other being of opinion that the charge was proved.

On appeal to the Court of Appeal:—

*Held*, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal.

*Held*, also, that the provisions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Elections Act which are in *pari materia*; and that there is no right of appeal to the Court of Appeal in respect of a charge of corrupt practices where the two Judges who try the charge fail to agree.

MACLAREN, J., dissenting.

THIS was an appeal by the petitioners against the election of T. G. Carscallen who had been declared elected by a majority of three votes as a member to the Legislative Assembly for the County of Lennox, at an election held on the 22nd and 29th of May, 1902, and the facts are sufficiently set out in the judgments.

The petition contained the usual charges of corrupt practices by the respondent, his agents and others.

The trial was held at Napanee on the 25th, 26th, 27th and 28th November, 1902, before OSLER, and MACLENNAN, JJ.A., two of the judges on the rota, when judgment was reserved as to five of the charges, the others being abandoned or disposed of at the trial.

*Watson, K.C., and W. S. Herrington, for the petitioner.*

*Walter G. P. Cassels, K.C., and E. Bristol, contra.*

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Dec. 12, 1902. OSLER, J.A.:—The particulars contain 52 charges.

One personal charge was added during the trial and several of the others were varied or extended at the petitioner's request to meet the supposed effect of the evidence.

Of these 53 charges 22 were tried out and the rest were abandoned by the petitioner and dismissed.

Of those actually tried 17 were dismissed at the conclusion of the arguments and judgment was reserved on the remaining five which are now to be disposed of. Of these the first is No. 22, a personal charge of bribery of one Whisken by the respondent by giving him fifty cents to induce him to vote for him.

Whisken was the caretaker of the town hall at Bath where a public meeting was held on the evening of the 17th May, 1902, in the interest of the respondent.

The respondent and others were present and at the close of the meeting, just after the respondent had left the platform, something was said as to the caretaker's charges for attendance, opening the hall and looking after the lights. The caretaker said that he was usually paid \$1.00 by each candidate. The respondent thereupon put his hand in his pocket and handed him some silver which he afterwards on going home or before he left the hall, and after the respondent had gone away, found to be \$1.50. He said that during their short conversation the respondent asked him for his vote, as he had done on a previous occasion, but he put him off by saying he would think about it.

When he noticed the extra fifty cents he had no reason, he said, to think it was given him as a bribe. He swore that no one was present in the hall when the money was paid but the respondent and himself.

The respondent was called and denied the charge absolutely, swearing that he paid simply the charge asked for, but whether in silver or a bill he did not remember.

Mr. Uriah Wilson, M.P., testified that he was present at the close of the meeting; that just after they left the platform Whisken came and spoke, as he thought, to him and asked him who was to pay him; that he said to Carscallen, that he had better pay him; that the latter asked Whisken how much it was and

on being told \$1.00 put his hand in his pocket and drew something out—the witness supposed that sum, but of course did not know—and gave it to him. The witness and the respondent then left together.

The respondent denied that on this occasion he asked Whisken for his vote. Wilson was not interrogated as to this.

Counsel for petitioner urged that no credit should be given to the respondent's denial: first, because on his examination for discovery he was unable to remember this transaction: and secondly, because of the unsatisfactory account he gave of the disposition of a sum of \$200 which he had received during the election from two of his friends.

For the first, I am not at all impressed with his failure to recollect or to state the circumstance upon his examination, because, whether intentionally or not, on the part of the examiner, the respondent's attention was not called to it as forming the subject of a charge of bribery, as it ought to have been.

Whisken's name was not mentioned and the whole stress of the examination was directed to the question of what payments had been made by the respondent on account of his personal expenses at the various places, Bath among the rest, which he had visited during his campaign.

It was attempted to show by selecting some of the answers, that the respondent had absolutely denied making any payment at all for the hall, but all such answers must be read in connection with others, in which he says that if the caretaker claimed anything for the use of the hall he probably paid him, and would not contradict him if he said so.

As to the two hundred dollars, I could wish the respondent to have been more candid and outspoken than he was about the footing on which he received it. No doubt it was a contribution towards his election expenses, though nothing may have been actually expressed or said about it, and he must have so understood it. I have no reason to believe that it was actually expended by him on his election, and how he may deal with it hereafter is a matter between himself and his friends, the contributors, to whom no doubt justice and honesty require that it should be returned.

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But even if I felt, which I do not, some suspicion of the truthfulness of the account which the respondent gave of what—in his belief—was the truth of the transaction, I should hesitate a long time before finding the charge of bribery by giving the extra fifty cents proved. The payment of the \$1 was of course perfectly legitimate, and the payment of the trifling additional sum ought, both as to fact and intent, to be proved, if not to a demonstration—yet at the very least by evidence producing moral certainty in the mind of the tribunal. For myself, that is not the conclusion to which I am led, applying the rule on which I have invariably acted in cases of this kind, where it is sought to disqualify the respondent; two of which I may recall, those namely of *West Algoma*, *Poutrey v. Conmee*, and *Kent*, ——— v. *Arch. Campbell*.

Were I to indulge in conjecture, I should say, that perhaps both witnesses are right, and that while Whisken may have found himself in the possession of \$1.50, the respondent supposed he had given him no more than \$1.00. Certainly, if Whisken did not know till he looked that he had \$1.50 in his hand, it is not less probable that the respondent may have inadvertently taken that much instead of \$1 from the silver in his pocket.

As regards, too, the probability of the respondent having attempted to bribe Whisken by the payment of this trifling sum, I think it is not unreasonable to observe, that although a drag-net as it were has been drawn over the constituency and everything which bore the slightest aspect of suspicion followed up, scrutinized or abandoned, after having been made the subject of a charge in the particulars; there has been an entire failure to substantiate a single other charge of bribery by the respondent or his agents, or to shew that money had been placed in the hands of agents for election purposes and not accounted for. I am therefore of opinion and so find as a fact, that the charge is not proven and ought to be dismissed.

Charge 29. Bribery of R. T. Jones by payment of a sum of money to induce him to vote for respondent: or for hire or payment for his employment in conveying voters to the poll:



or for violation of section 159, sub-sec. 1 (c) and (d) of the Election Act.

Jones voted about 9:30 A.M. After this and without any reference to his vote, so far as appears, he was asked by one Morley Wilson, said to be an agent of the respondent, to bring information from certain polls to Wilson's office of what persons had voted, and this he did throughout the day up to about 4 P.M. He was paid in all for his services as messenger \$2.25.

There is not the least pretence for saying that this was a corrupt payment. The man was employed and paid as a messenger. The charge appears in the candidate's accounts, and whatever might be said as to the effect of the payment upon the vote, whoever may have been the candidate for whom it was cast, no question as to that is before us, as the trial does not involve a scrutiny.

Charge No. 30 is one similar to the last in respect of one John Smith; the only additional circumstance being that Smith was in the first instance engaged to drive a team, a work which he did not in fact do, and was instead employed as a messenger.

Both these charges ought in my opinion to be dismissed.

Charge No. 43. Bribery of F. W. Parkinson by James A Wilson by payment of \$1.00 to induce him to vote for the respondent. The charge is made by Parkinson and is categorically denied by Wilson.

I find no circumstances which corroborate the former's statement, or which lead me to think that it is more likely to be true than the latter's denial. Rather is the contrary the case. I find the charge not proved.

I doubt moreover whether Wilson's agency was established.

The last of the reserved cases is the last charge in the particulars, charge No. 52, and is the only one brought before us, of which I can say that its disposition has given the least cause for anxiety.

This is a charge under section 165 of The Election Act; viz., that on the day of the election, the respondent and one Fraser, his financial agent, and other agents named, did hire and pay or promise to pay for certain horses, teams, carriages

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and other vehicles to convey voters to and from the polls on the day of the election.

Section 165 declares that such acts are illegal acts, but by sub-section 7 of section 2 (the interpretation clause) it is enacted, that where the words "corrupt practices" or "corrupt practice" occur in the Act they shall mean *inter alia*, a violation of section 165 of the Act. The violation of that section therefore if proved avoids the election under section 171 (1), which enacts that where it is found upon the report of the judges upon the trial of the petition, that any corrupt practice has been committed by a candidate or by his agent, whether with or without the actual knowledge of the candidate, the election shall be void unless saved under section 172.

Without entering into the facts in unnecessary detail, the evidence in support of this charge shews that the two livery stable keepers mentioned therein made higher charges than were customary for vehicles supplied to the candidates and their supporters while canvassing and in other ways conducting the election campaign: *e.g.*, if the charge usually made for a carriage to the village of Bath was three dollars, they would charge for the same during the contest four dollars, or more than three dollars. I do not gather from the evidence that this was done in every instance, but in a general way of speaking, it is the fact, that they made higher charges for their vehicles at this time than at other times.

Something was said by one of the witnesses about the extra work and wear and tear to which horses and vehicles were subjected on such occasions, and that was perhaps not an unreasonable observation; but I have little doubt, that the reason why the liverymen made the higher charges was to protect themselves from loss by furnishing their conveyances, as they expected to be asked to do, gratis, to the friends of both candidates on election day. This was the course they pursued towards both parties indifferently, and to both they furnished their conveyances without charge of any kind on that day. Had this been done by arrangement between the liverymen and the candidates or their agents, it would probably be easy to hold that there had been an attempt, and an unsuccessful one, to evade the statute. But, so far as the

evidence goes, the object and intention of the livery keepers rested in their own minds alone. There was in fact no such arrangement or agreement, express or implied, as I think the petitioner was bound to make out. All that those who applied to the liverymen are shewn to have done was to ask them to supply—and certainly to supply gratis—the vehicles they wanted; and they obtained and used them, as they supposed on those terms without charge, made or intended to be made, for their use on that day, either directly or indirectly, by means of the charges made for use at other times.

It is necessary for the petitioners to make out in support of a charge of this kind as clear a case and supported by as plain evidence as would justify a conviction for the penalty mentioned in the section, and I am of opinion that this has not been done.

If it should be thought that this is like an evasion of the Act, I can only say that doing something which the Act has not forbidden, though it may lead to a result which it is the object of the Act to avoid, is neither a breach nor an evasion of the Act, so as to bring the party within its penalties. The remedy, if one be thought necessary, is in the hands of the Legislature and would seem to be simple; namely, to prohibit livery keepers or persons who keep vehicles for hire from voluntarily offering them for use, or knowingly permitting them to be used for the purpose of carrying voters to the poll at an election.

We ought in my opinion dismiss this charge and the petition.

MACLENNAN, J.A.:—We reserved judgment at the trial upon five charges on which evidence was given, namely, charges numbered in the particulars 22, 29, 30, 43, and 52.

With regard to three of them, namely, numbers 29, 30, and 52, I agree with my learned brother Osler that they ought to be dismissed, and for the reasons which he has given.

On charge No. 43, which was one of bribery of F. W. Parkinson by James A. Wilson by the payment of one dollar to induce him to vote for the respondent, I was of opinion at the close of the argument upon the case, that the charge ought to

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be regarded as proved, but I thought then, and I am still of opinion, that there was no sufficient evidence of the agency of Wilson, and therefore that charge fails also.

Upon the remaining charge, No. 22, the personal charge of bribing one Whisken, a caretaker at the town hall of the village of Bath, I was of opinion after the argument, that the charge was established.

In consequence of the different opinion of my brother, Osler, I have since given the case much anxious consideration. I have, however, not been able to take a different view of it.

The witness, Whisken, gave me the impression of perfect candour and truthfulness, and there was no suggestion to the contrary. On the other hand, having regard to the respondent's evidence given upon his examination for discovery on the 7th of November, less than three weeks before the trial, and his evidence at the trial, I find it impossible to give credence to the account which he gives of the transaction in question, contradicting the evidence of Whisken. I refer particularly to his evidence of the interview with Whisken in the garden, as well as of what passed between them after the meeting at the hall, and also to the extraordinary account he gave of the sum of \$500 received by him from the Conservative Association and the two sums of \$100 each received by him from Alexander Carscallen and Uriah Wilson, respectively.

I therefore feel myself compelled to find the charge No. 22 established; but my learned brother being of a different opinion the charge must be dismissed.

The following statement is taken from the judgment of Moss, C.J.O., in the Court of Appeal:—

The present appeal having been lodged, my brothers Osler and MacLennan, the two rota judges who tried the petition herein, certified on the 27th of Dec., 1902, that in the result of the trial the petition was dismissed with costs.

They further certified that they disagreed as to whether the respondent was duly returned or elected in that, they did not agree in a finding upon the charge, that the respondent was personally guilty of a corrupt practice in paying money to one



F. B. Whisken to induce him to vote for the respondent at the election.

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The appellants limited the subject of their appeal to five charges, viz., Nos. 22, 52, 43, 29 and 30, set out in the particulars. Each is a charge of corrupt practice by the respondent or his agents and others.

No. 22 is the charge referred to in the certificate as that upon which the judges disagreed.

No. 52 charges the respondent, his financial agent and other persons with hiring and paying, or promising to pay, for vehicles to convey voters to and from the polls on election day. The judges agreed in dismissing it.

No. 43 charges, that on the day of the election one James Wilson, an agent of the respondent, paid the sum of \$1 to one F. W. Parkinson in order to induce him to vote for the respondent.

The judges agreed in holding that the charge failed, but differed in opinion in respect of the grounds. Osler, J.A., was of opinion that the fact of payment was not established and he also doubted whether agency was established. Maclellan, J.A., was of opinion that the fact of payment was proved, but thought that agency was not proved. In the result they agreed in dismissing the charge.

No. 29 charges, that on the day of the election, the respondent, his financial agent and another person paid a sum of money or other consideration to one R. T. Jones, in order to induce him to vote for the respondent. The judges agreed in dismissing it.

No. 30 charges, that on the day of the election, the respondent, his financial agent and another person paid a sum of money to one John Smith, in order to induce him to vote for the respondent. The judges agreed in dismissing the charge.

At the opening of the appeal, objection was taken on behalf of the respondents to the jurisdiction of the court to entertain the appeal in respect of any of the charges. The appeal was allowed to proceed subject to the objection and argument was heard upon the whole case.

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The appeal was argued before MOSS, C.J.O., GARROW and MACLAREN, JJ.A., and MACMAHON and MEREDITH, JJ., on the 7th, 8th and 9th January, 1903.

*W. G. P. Cassels*, K.C., and *E. Bristol*, for the respondent. This Court has no jurisdiction to entertain this appeal. The Ontario Election Act, R.S.O. 1897, ch. 9, and The Ontario Controverted Elections Act, R.S.O. 1897, ch. 11, must be considered together. No candidate or other person is to be disqualified or subjected to any disability or penalty for any corrupt practice without the concurrent judgment of the two trial judges, R.S.O. 1897, ch. 9, sec. 171, sub-sec. (2). That provision was first introduced in 1884 by 47 Vic. ch. 4, sec. 48 (O.), but was omitted from the revision of the statutes in 1887 and re-enacted in a very curious manner in 1895 by 58 Vic. ch. 4, sec. 18 (O). One reason why the jurisdiction of the court is taken away is, that where a corrupt act is charged the trial must be had before two judges—in other cases, one judge is sufficient. The provisions relating to corrupt practices were enacted previous to section 171 where the penalty is inflicted, the loss of the seat. Sub-sec. (2) of that section, providing that no candidate or other person is to be disqualified or subject to any disability or penalty for any corrupt practice without the concurrent judgment of the two trial judges, is made to apply to the loss of the seat in sub-sec. (1) so the seat cannot be declared vacant without the concurrent judgment of the two judges. The words "This applies" were considered by Mr. Justice Burton in the *South Renfrew* case (1884), 1 E.C. 70 at p. 79, when the section was made applicable to section 162 of R.S.O. 1877, ch. 10. The two judges really try the candidate as a criminal and the principles of a criminal trial have to be applied. In case of a disagreement, there might have been an appeal under sub-sec. (1) of sec. 56 of The Controverted Elections Act, but what was the jurisdiction on an appeal from the decision of the judges. Section 57 was passed in 1884 and at the same time sub-sec. 2 of sec. 171 was passed. Under sub-sec. (2) of the former, if the judges differ, there is an appeal. The same in sub-sec. (3) if they differ as to part. Then the right of appeal is taken away in certain cases by sub-secs. (5)

and (6). Read the latter with sec. 171 and the right of appeal from a decision of the judges is absolutely taken away. Is there a decision here? The judges may differ in opinion, but the result is the decision. The decision of the court is its judgment: Anderson's Dictionary of Law. Or a judgment given by a competent tribunal: Bouvier's Law Dictionary: *In re Hall* (1883), 8 A.R. 135 at pp. 154 and 155; *The Attorney-General v. The Dean and Canons of Windsor* (1860), 8 H.L.C. 339; *Hartman v. Greenhow* (1880), 102 U.S.R. 672. The dissent of one judge does not make it any the less a decision. Then in section 58, the words used are "and any party is entitled to the opinion of the Court of Appeal," shewing there may be disagreements in some cases where no appeal lies. Section 68 gives the Court of Appeal certain powers, but only in cases where an appeal lies. If the two Acts and amendments are construed together, the conclusion must be arrived at, that in cases of disqualification or corrupt acts there is no appeal to this Court.

*Watson, K.C., and Grayson Smith, contra.* In the revision of the statutes of 1877, section 158 provided for the avoiding of the election on proof of a corrupt act, section 161 referred to disqualification, and section 162 was the personal relief clause. Section 48 of 47 Vict., ch. 4 (O.), was introduced in 1884, requiring the concurrent judgment of the two Judges, but was made applicable to sec. 162 of the then Election Act, referring expressly to the personal penalty and personal disability. Sec. 48 was omitted in the revision of the statutes in 1887, where it should have appeared as a subsection to section 165, but being omitted, section 18 of 58 Vict., ch. 4 (O.), was passed in 1897 providing for its having "been in force from the time of the passing thereof." In the meantime sec. 162 had become sec. 165, and sec. 48 was applied by the revisors to 162, which was a mistake. The history of the legislation shews that The Ontario Election Act was enacted first and was for the regulation of elections and corrupt and illegal practices, etc.; while The Controverted Elections Act, which was not enacted until 1870, separated the trials of petitions and matters incident thereto from The Election Act, and it was not until 39 Vict., ch. 10, sec. 34 (O.), that provision

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was made for the trial by two Judges; but until the mistake was made, the intention of the Legislature was, that the joint report of two Judges should be necessary to find the personal disability or personal penalty, as distinguished from the voiding of the election and vacating the seat; and sub-sec. 3 of sec. 171 of The Election Act expressly refers to the Court of Appeal adjudicating in respect of corrupt acts. The jurisdiction of the Court of Appeal is also recognized in sections 179 and 180. The Controverted Elections Act being later than The Elections Act, must prevail against the latter where any inconsistency appears, and the Court of Appeal is recognized by sec. 2, sub-sec. 1; by sec. 37, in case of a disagreement; by sec. 57, sub-secs. 2, 3, 5, and by secs. 58 and 66, the latter being very wide. In the *East Elgin* case (1899), 2 E.C. 100, the trial Judges maintained the seat and held that a corrupt practice under sec. 168 had not been established, still there was an appeal. Section 68 authorizes an appeal on any question of law or fact. Section 66 is subsequent to sub-sec. 6 of sec. 57 in the revision, which is a new enactment, and should prevail. Section 75 makes the decision of the Court of Appeal final. The corrupt practice here was not proved and there is no *decision* upon it. There is a disagreement as to whether or not the seat was void and everything as open; and an appeal lies in respect to any matter which was the subject of the petition. The Judge's certificate states "we disagree as to whether or not he was duly returned or elected." The consequence of a disagreement may be that the petition fails, but that is a result, not a decision: *Re William A. Hall* (1882), 8 A.R. 31. This Court is not bound to report disqualification.

*Cassels*, in reply. The legislation shews that this Court is not a court to find a candidate "guilty" who has already been found "not guilty" by the trial Judges, but rather may relieve him or hear questions of appeal other than corrupt acts.

March 6. Moss, C.J.O. :—The first question to be now dealt with is that raised by the objection to the jurisdiction of the Court. The point is taken that the establishment of the charges forming the subject of the appeal involves the disquali-



fication of the respondent and of other persons, and subjects them to disabilities and penalties for corrupt practices, and that a candidate or other person who has not been found guilty of a corrupt practice by the two trial judges has at least two shields against an appeal to this Court.

Reference is made to sec. 57 (6) of The Controverted Elections Act and to sec. 171 (2) of The Ontario Election Act.

By the former of these it is enacted that there shall be no appeal from a decision of the judges finding that a candidate or other person has not been guilty of corrupt practices. By the other it is enacted that no candidate or other person is to be disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice without the concurrent judgment to that effect of the two judges by whom the election petition is tried.

The appellants scarcely contended that if the trial judges had agreed in their finding in respect of all the charges an appeal could nevertheless be entertained. Indeed the first quoted enactment peremptorily forbids an appeal in such case. But as I understand the argument it is that the trial judges, having disagreed in respect of at least one charge, there is no decision as regards it, and an appeal in such case is expressly provided for by sec. 56 of The Controverted Elections Act, so that there is certainly jurisdiction to entertain an appeal on that charge, and that there being jurisdiction to that extent, the whole case is open under secs. 66, 67, 68 and 69 of The Controverted Elections Act, unless the appellants choose to limit the appeal as provided in sec. 67.

There are several difficulties in the way of supporting the latter contention.

Assuming that a disagreement is not to be considered a decision of the judges, their concurrent judgment is most certainly a decision. And when there is such a decision, finding a candidate or other person not guilty of corrupt practices, there is nothing in the legislation to enable the Court of Appeal to sit in judgment upon that decision in the face of sec. 57 (6) of The Controverted Elections Act.

Sec. 66 enabling a party who is dissatisfied with the decision of the judges on any question of law or fact, to appeal

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against the same must be read in connection with sec. 57 (6) which it was not intended to override. In fact as appears from the history of the legislation, sec. 57 (6) is the later enactment and was added to the law while sec. 66 was already in force and if there is an inconsistency, sec. 66 must give way *The Dean & Chapter of Ely v. Bliss* (1842), 5 Beav. 574 at p. 584.

Secs. 66 & 67 prescribe the procedure to be adopted where a right of appeal exists. They do not touch the right itself. And so with regard to the next succeeding sections. They deal with the power of the Court in a case properly before it.

I think it is clear that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, in which otherwise there is no appeal.

The question remains whether in respect of a charge of corrupt practices, as to which the Judges have disagreed, there is a right of appeal.

The legislation bearing on this question is in a state of confusion, owing largely, if not entirely, to the changes introduced by the Act 47 Vict. cap. 4 (O), and to the manner in which some of its provisions were dealt with in the subsequent revisions, of the statutes.

There are portions of The Ontario Controverted Elections Act (*e.g.* sec. 56 & sec. 57 (2)), which standing alone would seem to confer a general right of appeal in cases of disagreement between the judges. But they must be read not only with the other provisions of the same Act, but also with the provisions of The Election Act, which are *in pari materia*.

The language of sub-sec. (5) of sec. 57 is very wide. It provides that if the judges differ as to any matter on which under secs. 172 & 174 of *The Ontario Election Act*, or otherwise any disqualification, disability or liability to a penalty depends, they shall certify such difference, and the candidate shall not be disqualified or subject to a disability or penalty.

In this sub-section the words "subject to appeal" which are found in sub-sections (2) and (3) do not occur, a plain indication

that in the cases therein provided for there is to be no appeal.  
What are the cases?

Secs. 172 & 174 are the provisions of The Election Act which under certain circumstances operate, the one to save the election, and the other to relieve the candidate from disqualification, disability or penalty.

As to cases within these sections there is no appeal from a disagreement.

Then what is the force of the words "or otherwise" if not to extend the same effect to a difference or disagreement on every matter, on which a candidate might be disqualified for a corrupt practice?

This sub-section covers the case of a candidate but does not extend to others. But sub-sec. (6) deals with the cases of candidates and others.

Sec. 171 (2) of The Election Act is still wider and more comprehensive. While it does not in terms exclude an appeal, it is apparent that in the case of a disagreement between the trial judges, a judgment in appeal finding a candidate or other person guilty of corrupt practices must subject him to disqualification or other disability or penalty without the concurrent judgment to that effect of the two trial judges.

It is argued that the finding of the Court of Appeal does not necessarily lead to disqualification, disability or penalty; that the finding is merely a judgment upon the charge of corrupt practices, involving it may be the avoidance of the election, but not the infliction of the punishment upon the guilty parties. In other words that the finding of the Court may avoid the election under sec. 171 (1), but not disqualify under sec. 173. This apparently anomalous result may happen where sec. 174 can be applied. But there is nothing on which to base a like result, where the circumstances do not warrant the application of that section.

And it must be borne in mind that the provisions of sec. 171 (2) are expressly made to apply to 171 (1), and to the conditions and circumstances therein mentioned; as well as to other matters, on which corrupt practices or the consequences thereof in any way depend. So that the concurrent judgment of the two trial judges must be present, not only for the purpose of disquali-

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fication, disability or penalty, but for the purposes of avoiding the election for corrupt practices.

It is not unlikely that as suggested in argument sub-sec. (2) of sec. 171 was misplaced in the revision of the statutes; but, we must now take it where it is found and apply it as directed.

Sec. 57 of The Controverted Elections Act and sec. 171 (2) of The Ontario Election Act had their origin in the 47 Vict. cap. 4 (O.) known as The Election Law Amendment Act, 1884.

As the law stood when it was passed, allegations of corrupt practices against a candidate or his agents were required to be tried by two of the judges of the rota sitting together; and no candidate was to be unseated for corrupt practice, nor was any person to be declared guilty of a corrupt practice, except upon the decision of the two judges jointly, or of the Court of Appeal, R.S.O. 1877, cap. 11, sec. 38.

So that the Legislature at that time contemplated an appeal even in the case of a concurrent judgment.

The effect of the 47 Vict. cap. 4 (O.) is now to be considered.

In sec. 10 the provisions, which are now sec. 57 of The Controverted Elections Act were for the first time enacted, and thereby appeals were limited to a considerable extent. Sec. 33 amended sec. 38 of R.S.O. 1877, cap. 11 so as to provide that no person should be declared guilty of a corrupt practice *or disqualified* except upon the decision of the two judges jointly, or of the Court of Appeal.

Having regard to sub-sec. (6) of sec. 10, the last six words must have been retained through inadvertence; for sub-sec. (6) declared, that there should be no appeal from a decision of the judges finding a candidate or other person not guilty of corrupt practices.

Then came sec. 48, enacting amongst other things, that "to remove doubts, it is . . . declared that it has been, and is, the policy of the election law, and the intention and meaning of the several statutes in that behalf, that . . . no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice, without the concurrent judgment to that effect of the two judges by whom the election petition is tried." Speaking of this clause the late Sir Thomas Galt, then Mr. Justice Galt, said: "This



alters the law, because by sec. 38 of R.S.O. ch. 11, the Court of Appeal had the power to declare a candidate guilty of a corrupt practice, and the operation of this clause would appear to have withdrawn that power, and now nothing but the concurrent judgment of the two judges, by whom the election petition is tried, will work a disqualification:" *South Renfrew Election* case, 1 E.C. 70, at p. 85. The case went to appeal and at p. 372 of the same volume, Osler, J. A., pointed out the apparent discrepancy between the last clause of sec. 48, which speaks of disqualification, resulting from the decision of the Court of Appeal and sec. 10, sub-sec. (6) of the Act.

Sec. 48 further declared, that "this applies to sec. 162 of *The Election Act*, and the conditions and circumstances therein mentioned, as well as to other matters on which corrupt practices or the consequences thereof in any way depend." Sec. 162 was at that date the exculpatory clause, by virtue of which a candidate, by whom or with whose knowledge or consent, a corrupt practice had been committed, might be relieved from disqualification or other disability or penalty under the circumstances therein stated.

And lastly sec. 48 further declared, that "in case of an election being set aside and a new election had, to the same Legislative Assembly, or otherwise, the new election cannot be avoided by setting up corrupt acts or practices by the candidate in or during the former election, or affecting the same, which were not set up and proved at the former trial, and so adjudged by the two judges at the former trial, or by the Court of Appeal before the subsequent election, as by law to involve such disqualification, disability or penalty." It was the reference to the Court of Appeal in this clause, that called for the remark of my brother Osler, already referred to.

These inconsistent and conflicting provisions were made no plainer by the declarations in sec. 18 of 48 Vict., cap. 2 (O.), passed in 1885, but omitted along with all the succeeding sections of that Act from the Revised Statutes of 1887 and never since re-enacted.

Sec. 48 of 47 Vict. ch. 4 (O.) was also omitted from the revision of 1887. It is not necessary to consider in what condition its omission left the law, for in 1895 it was restored to the statute

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book by sec. 18 of 58 Vict. ch. 4 (O.), which in part enacted that "notwithstanding the omission of sec. 48 of ch. 4 (O.) . . . from the Revised Statutes of Ontario, 1887, such section is now and has been in force from the time of the passing thereof." The enactment was passed without noticing apparently that in the meantime sec. 162 of The Election Act to which sec. 48 referred had become sec. 165, and sec. 158 had become sec. 162 of R.S.O., 1887, ch. 9. In the revision of 1897 sec. 162 became sec. 171 (1), and sec. 165 became sec. 174, and properly speaking, the part of the revised sec. 48, which referred to sec. 162, ought to have been attached to sec. 174, but instead it was made sec. 171 (2), and was made to refer to sec. 171 (1). The effect is, as before pointed out, that its provisions are expressly made to apply not only to cases of disqualification, disability and penalty, but also to cases of avoidance of the election for corrupt practices, and it follows that a judgment of the Court of Appeal, in a case of disagreement of other judges on a question of corrupt practice, holding the corrupt practice proven would bring about a result which The Election Act says shall not be without the concurrent judgment of the two trial judges.

It may be conjectured that the provisions of sec. 171 (2) were intended to apply only to the trial and were not intended to touch the proceedings in appeal. But the intention is not so clearly expressed as to enable us to give it that effect, or to hold in face of the plain language of that sub-section and of sub-sections (5) and (6) of sec. 57 of The Controverted Elections Act that the Court has jurisdiction, upon an appeal against a candidate or other person charged with corrupt practices to render a decision not arrived at by the joint judgment of the trial judges.

Although there are to be found in various sections of the legislation references pointing to an appeal in case of disagreement on charges of corrupt practice, they are not sufficiently clear or definite to overcome the distinct declarations of the other sections. Therefore, from the cases of disagreement in which an appeal is provided for, there must be excepted the cases involving charges of corrupt practice.

The result is that in this case the appeal does not lie in respect of any of the charges, and it must be dismissed.

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The costs will follow the result.

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GARROW, J.A. :—With reference to the main question involved in this appeal, namely, whether where the two Judges who try a charge of corrupt practices fail to agree, there is a right of appeal to this Court, I have reached the conclusion that no such right exists.

By section 37 of R.S.O., 1897, ch. 11, allegations of corrupt practices against a candidate or his agent are to be tried by two judges sitting together, and no candidate is to be unseated for corrupt practices, nor any person declared guilty of a corrupt practice or disqualified, except upon the decision of the two judges jointly, *or of the Court of Appeal*.

All other charges affecting an election may be tried before one judge. By sec. 55 the judge or judges trying the petition shall determine who was duly returned or elected, or whether the election was void, and shall certify in writing such determination to the Speaker, or if there is no Speaker, to the Clerk of the House; and upon such certificate being given such determination shall be final, "subject only to the appeal hereinafter mentioned."

By sec. 56, if the Judges trying the matter disagree they are directed to certify such disagreement; and either party may thereupon bring the matter before this Court, and this Court shall in disposing thereof have the same jurisdiction in all respects *as on an appeal from a decision of such Judges*, and therein may determine all questions of law or fact which the Judges disagreeing ought or should have determined, and in such case the Registrar of this Court shall thereupon certify to the Speaker, or to the Clerk, if there is no Speaker, the judgment and decision of the Court upon the case in the same manner and to the same effect as according to the judgment and decision of the Court of Appeal the trial judges should have done.

By sec. 57 (1) in case of a trial before two judges, every certificate and every report sent to the Speaker shall be under the hands of both Judges.

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(2) If the Judges differ as to whether the member whose return or election is complained of was duly returned or elected, they shall certify that difference, and the member shall, *subject to appeal*, be deemed to be duly elected or returned.

(3) If the Judges determine that a member was not duly elected or returned, but differ as to the rest of the determination, they shall certify that difference, and the election shall, *subject to appeal*, be deemed to be void.

(4) If the Judges differ as to the subject of a report to the Speaker, they shall certify that difference, and make no report on the subject on which they so differ.

(5) If the Judges differ as to any matter on which, under sections 172 and 174 of *The Ontario Election Act*, or otherwise, any disqualification, disability or liability to a penalty depends, they shall certify such difference, and the candidate shall not be disqualified or subject to a disability or penalty.

(6) There shall be no appeal from a decision of the Judges finding that a candidate or other person has not been guilty of corrupt practices, or finding in favor of a candidate any other matters of defence mentioned in sec. 174 of *The Ontario Election Act*.

Sec. 58 provides for the procedure upon an appeal to this Court in case of a disagreement by a party "entitled to the opinion of the Court of Appeal with respect to the matter of the disagreement," while sec. 66 provides apparently a general right of appeal to any party to an election petition who is dissatisfied with the decision of the judge or judges on any question of law or of fact.

Then turning to "The Election Act," R.S.O. 1897, ch. 9, sec. 171, sub-sec. 1, provides that where it is found upon the report of the Judges, that any corrupt practice has been committed by a candidate or by his agent, the election shall, except in the cases mentioned in sec. 172, be void.

Sub-sec. 2 provides, that no candidate or other person is to be disqualified or subject to any disability or penalty for any corrupt practice, or alleged corrupt practice, without the concurrent judgment to that effect of the two Judges by whom the election petition is tried. This applies to the preceding sub-



section and to the conditions and circumstances therein mentioned, *as well as to other matters on which corrupt practices or the consequences thereof in any way depend.*

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Corrupt practices are defined by sec. 2, sub-sec. 7; and their consequences, when established in addition to avoiding the seat, are provided for by secs. 173, 177. These consequences, including as they do deprivation of civil rights, are so serious as to justify the view which prevails, that the proper construction of the statute in this respect is that usually applied to penal statutes.

"The Controverted Elections Act" is primarily one of procedure. It creates no offence, although it, too, contains a definition of corrupt practices, sec. 2, sub-sec. 6, in terms similar to those in "The Election Act."

The right to appeal, if it exists, must be found in the statute, as apart from the statute there is no such inherent right, and so regarding the matter and bearing in mind the penal nature of the statutes, I have been wholly unable to discover any provision in them, which clearly permits an appeal in such a case as this; although undoubtedly, there are expressions to be found, the result, I think, of imperfect consolidation, which at least afford room for doubt and argument.

To hold otherwise would, I think, be to ignore the very express provision of sub-sec. 2 of sec. 171 of "The Election Act," and also in addition to ignore the fundamental intention of the Legislature in prescribing that such charges shall be tried by two Judges, and not by one Judge, or by the Court of Appeal. The proper judgment, in such a case, where the Judges fail to agree, is, that the charge should stand dismissed, the dismissal to have the same effect for all purposes, as a dismissal by agreement of judgment. It is, and should be, a complete and final end to the charge, and quite properly so I think, because no appellate court can possibly be in as good a position to reach a just and righteous decision in such a case, as the Judges who try the petition and who see and hear the witnesses in open court. Such cases almost always present pure questions of fact, depending for proof upon the credibility of witnesses, not always drawn from circles

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in which that virtue is usually most abundant, and therefore peculiarly subjects for final disposal by the Judges at the trial, and for the same reasons peculiarly unfit as subjects to be dealt with by an appellate court.

In reaching this conclusion, I have not overlooked, or at least intended to overlook, the various sections before quoted, relied on as giving the right of appeal. I think it will be found on examination, that these sections regarded historically are survivals from a time when undoubtedly there was a right of appeal, both by the petitioner and the respondent, but they must now be read in conjunction with sub-sec. 2 of sec. 171 of "The Election Act," the origin of which is 47 Vict., ch. 4, sec. 48 (O), which very plainly states in order "to remove doubts" what the policy of the Legislature then was, namely, "that no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice, without the concurrent judgment to that effect of the two Judges by whom the election petition is tried."

And it is material to observe, that the same statute, in sec. 10, supplies the original of it, but is now sec. 57 in The Controverted Election Act, and therefore it is, I think, the proper interpretation to read sub-secs. (2), (3) and (4) as referring to differences, other than a difference upon a charge of corrupt practices, and sub-secs. (5) and (6) as supplementary to the declaration of policy so emphatically stated in sec. 48.

MACLAREN, J. A.:—The first question to be decided is, whether there is an appeal to this court where the trial judges have disagreed on a question of corrupt practices. It is admitted that such right formerly existed; but it is claimed that it was taken away by the amending Act of 1884, and that, notwithstanding the repeal of section 48 of that Act, and its omission from the Revised Statutes of 1887 (no doubt by inadvertence), such has been the law since its revival by the Act of 1895, and especially by its being made a part of section 171 of The Election Act in The Revised Statutes of 1897.

No doubt there are provisions in The Election Act and in The Controverted Elections Act, as now found in the Revised Statutes of 1897, which, if read independently and by them-

selves, would support an argument either for or against such an appeal. The difficulty arises when one endeavors to reconcile these conflicting and apparently contradictory provisions, and seeks to harmonize them in such a way as to give to each its proper bearing and effect and deduce the rule that is most consistent with the legislation as a whole.

The clauses which require such special consideration are sec. 171 of The Election Act (R.S.O. 1897, ch. 9), and sections 37, 56, 57, 58 and 66 to 71 inclusive, of The Controverted Elections Act (R.S.O. 1897, ch. 11). In my opinion it will aid in the proper construction of these sections to review in chronological order the enactments from which these sections have been derived, and the changes which have from time to time been made by them in the election law.

As the present difficulty arises out of a question of disagreement, it is not necessary to go farther back than The Election Act of 1876, when provision was first made for the trial of election petitions by two judges sitting together. Section 34 of that Act reads:—"Every election petition which alleges corrupt practices against a candidate or his agents shall be tried by two of the judges on the rota sitting together; and no candidate shall be unseated for corrupt practice, nor shall any person be declared guilty of a corrupt practice, except upon the joint decision of the two judges, or of the Court of Error and Appeal." It will be observed that this is substantially the same as section 37 of the present Controverted Elections Act, except that in the latter this court is substituted for the old Court of Error and Appeal.

Section 46 of the Act of 1876 reads:—"Whereas it is expedient that the Court of Error and Appeal shall have a larger jurisdiction than hitherto has been exercised on appeals in election cases on or involving questions of fact, it is hereby enacted that upon such appeal the court shall review the decision upon questions of fact as well as of law, and shall draw such inference from the facts or evidence as the judge or judges who tried the case should have drawn, and shall pronounce such judgment, both upon questions of law and of fact, as in the opinion of the said court should have been delivered by the said judge or judges." This section is substantially

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reproduced in sections 68 and 69 of the present Controverted Elections Act.

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Section 47 of the Act of 1876 reads:—"In case of disagreement between the judges before whom a case is tried, they shall certify such disagreement, and either party may thereupon bring the matter before the Court of Error and Appeal, and that court shall, in disposing thereof, have the same jurisdiction in all respects as on an appeal from a decision of such judges." This is the same in effect as section 56 of the present Act, so far as it affects the question we are now considering.

The next changes requiring consideration are those found in the amending Act of 1884 (47 Vict. ch. 4). Section 10 of that Act is now section 57 of R.S.O. 1897, ch. 11, and the relations of subsections 5 and 6 to the subject of this appeal will be considered presently. Section 48 has become part of section 171 of the present Election Act and was chiefly relied upon by respondents' counsel as decisive of the present appeal. The part affecting the matter now being considered reads as follows:—"To remove doubts, it is hereby declared that it has been and is, the policy of the election law, and the intention and meaning of the several statutes in that behalf . . . that no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice, without the concurrent judgment to that effect of the two judges by whom the election petition is tried; that this applies to section 162 of The Election Act, and the conditions and circumstances therein mentioned, as well as to other matters on which corrupt practices or the consequences thereof in any way depend." . . .

Now it is well known that no doubts had then been raised relating to the right of appeal in case of disagreement by the trial judges, and they could not well be raised, as the Act of 1876 not only gave a clear right of appeal in such a case, but it went farther and expressly extended the jurisdiction and powers of the Court of Appeal, as shewn above, in order that it might deal more fully with such appeals. It is equally well known that this clause was specially designed to meet the *South Renfrew* case of 1883, 1 E.C. 70, where the trial judges disagreed, but which was not taken to appeal; and that the Legislature on



finding that its object had not been attained by the general language of the above clause dealt with it specifically and by name in the following year: see 48 Vict. ch. 2, sec. 19. I am unable to find in this section 48 evidence that the Legislature meant to take away the right of appeal in case of disagreement, the more especially as the remaining part of the section in terms recognizes the finding of corrupt practices by the Court of Appeal.

In tracing the history of the legislation it is noticeable that this section was not embodied in the Revised Statutes of 1887, but is there declared to be "effete" and is expressly repealed. It was, however, re-enacted in 1895 by 58 Vict. ch. 4, sec. 18 (O.), and declared to be and to have been in force ever since its enactment in 1884.

In the revision of 1897 section 48 of the Act of 1884 was inserted as sub-sections 2 and 3 of section 171 of The Election Act. It will be seen that in section 48 reference is made to section 162 of The Election Act, which, in the revision of 1887, had become section 165. The draughtsmen of the revision of 1897, apparently overlooking this change made the reference to section 162 of the revision of 1887. This manifest error, while making the whole section as it now stands, less intelligible, did not, in my opinion, under the rules laid down in sec. 9 of the Act relating to the Revised Statutes (60 Vict. ch. 3 (O.)) operate such a change in the pre-existing law, as to give to this section the meaning claimed for it by the respondent, or a meaning which the original enactment of 1884 would not bear, and which is inconsistent with other provisions of the law.

It is a well known rule of law, that an appeal does not lie, unless expressly given. It is, however, equally well established that when, as here, a general appeal is given by a statute, such right of appeal is not to be taken away by mere inference or implication: *The King v. The Justices of Cumberland* (1822), 1 B. & C. 64; *The King v. The Justices of West Riding of Yorkshire* (1823), 2 B. & C. 228. These cases are, to my mind, decisive of the present question. The onus is first on the appellant to show clearly that a general appeal is given: after that is done, the onus is shifted, and it is equally on the respondent to shew clearly that it is taken away in the particular case, and that it falls within the exception.

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Section 66 of The Controverted Elections Act expressly gives an appeal to any party to an election petition, who is dissatisfied with the decision of the trial judges on any question of law or fact. Section 56 provides that in case of disagreement of the trial judges, either party may bring the matter before the Court of Appeal, and that court in disposing thereof shall have the same jurisdiction in all respects as on an appeal from the decision of such judges, and may determine all questions of law or fact which the judges disagreeing might or should have determined, and in the same manner as in the opinion of the Court of Appeal the disagreeing judges should have done.

Section 37, which is similar to section 34 of the Act of 1876, above cited, provides that no candidate shall be unseated for corrupt practices, or any person declared guilty of a corrupt practice or disqualified except upon the decision of the two trial judges jointly, or of the Court of Appeal. These last words are, to my mind, idle and without meaning, unless an appeal lies in a case of disagreement. They cannot point to the Court of Appeal finding a person guilty, where the trial judges have agreed in acquitting, as there is then no appeal. They are inapplicable either to the allowance or dismissal of an appeal when the trial judges have agreed in finding the person guilty.

Section 57 (6) provides that there shall be no appeal from a decision of the trial judges finding that a candidate or other person has not been guilty of corrupt practices. This is inapplicable to the present case unless a "decision" includes a "disagreement." Whatever they might mean in some other connection, the Act throughout appears carefully to distinguish between them, using the latter only when the two trial judges have agreed. Here we have their formal certificate, that they did not agree in a finding on the charge in question. It is also to be observed, that while the Act speaks of a party appealing against a decision, the language used in case of disagreement is that "either party may bring the matter before the Court of Appeal," when that court may either itself determine all questions of law or fact, or may refer the case back to the trial judges with such declarations and directions as the Court of Appeal may think fit.

I am also of opinion that section 57 (5) does not aid the respondent. I think that sub-section presupposes a finding on the question of the corrupt practice, and deals only with a disagreement as to the trifling nature or extent of the Act, or the excusable ignorance of the candidate, or some other question that might relieve from the natural result of the corrupt practice found proven.

I also consider that sub-section 2 of section 171 of The Election Act was meant to apply only to the trial, and that under the rule laid down in *The King v. The Justices of Cumberland* above referred to, it cannot be held to have taken away the general right of appeal expressly given, without doing violence to other unambiguous statutory provisions.

For these reasons I think the right of appeal is not taken away in case of a disagreement of the trial judges as to a corrupt practice.

As, however, a majority of the court decide that no appeal lies, I abstain from any comment upon the evidence in the case brought before us.

MEREDITH, J.:—Whether the Court has jurisdiction to condemn a person, who has been acquitted by the trial judges: or whom they have been unable to find guilty, is the first question, and one of importance though not difficult of solution, when looked at from the proper standpoint.

It is incontrovertible, that this Court has no inherent jurisdiction: it owes its existence and powers entirely to the statute-law: and the power in question must be clearly given, else it ought not to be exercised; and the case being one in which there is no appeal beyond this Court, and one affecting the liberty of the subject, great care should be taken, that jurisdiction should not be exercised, which the Court has not.

By the very terms, the very plain words, of section 57 (6) of "The Ontario Controverted Elections Act," "There shall be no appeal from a decision of the judges finding that a candidate or other person has not been guilty of corrupt practices, or finding in favour of a candidate any of the matters of defence mentioned in section 174 of The Ontario Election Act."

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This indubitably covers the cases which the trial judges dismissed and clearly excludes the appeal as to them.

But it is said that section 37 and 66 are in conflict with section 57 in this respect, and confer jurisdiction upon this court.

If that were so, if one section expressly conferred the power and another expressly took it away, ought the Court to exercise it? Assuredly not. It should be left to the Legislature to confer it in a comprehensible manner, if really meant to be conferred. There should be no usurpation of authority, no striving after jurisdiction.

But section 37 does not confer jurisdiction nor purport to do so. It is a negative provision, with an exception: no one shall be condemned, except upon the decision of the trial judges jointly, or of the Court of Appeal. The authority of the trial judges is not there conferred, it is plainly and unquestionably conferred by other sections: but nowhere is any such authority directly conferred upon the Court of Appeal.

These uncertain words ought not to outweigh the certain and unmistakable words of section 57, even if they could not be satisfactorily accounted for. But they are readily accounted for—the reason for their existence is quite obvious.

For instance, an appeal unquestionably lies against a condemnation by the trial judges, and unquestionably the Court of Appeal may pronounce judgment thereupon: see sections 68 to 75. Again, under section 65 a special case may be stated upon which the decision of the Court is final, and is to be reported by the Court to the Speaker; if the parties agree upon the facts the Court may so decide whether they cause disqualification; so the words are quite applicable to such and probably other cases, and not quite meaningless, nor, perhaps, even unnecessary.

And section 66 can well be read together with section 57. It provides for the manner in which appeals are to be taken, and cannot be considered as giving a right of appeal, which another section expressly prohibits.

So too, as to a case of disagreement of the trial judges. Under section 171 of "The Ontario Election Act," all right of appeal is, in such a case as this, plainly excluded: "No



candidate or other person is to be disqualified or subject to any disability or penalty . . . without the concurrent judgment" of the two trial judges.

This is no more inconsistent with sections 37 and 66 of "The Ontario Controverted Elections Act" than section 57 is with sections 37 and 66. It is even less so. Effect can, and is to, be given to all.

Under section 56, in case of disagreement between the trial judges, either party may bring the matter before the Court of Appeal, and that Court shall have the same jurisdiction, as on an appeal from a *decision* of such judges. But that Court has no jurisdiction on appeal from a *decision* in such a case as this; and, added to that, is the plain and express prohibition against disqualification, etc., except upon a concurrent judgment of the two trial judges, contained in section 171 of "The Ontario Election Act," and reiterated in section 57, sub-section 5, of "The Ontario Controverted Elections Act."

And all this accords with first principles in the administration of justice in criminal cases, and is readily understood by those familiarized by experience with the law and practice in such cases.

One of the first of such principles being, that no one shall be more than once put in jeopardy: another, that formerly appeals were generally confined to cases of conviction.

Bribery under the Acts is for all practical purposes a crime. It is punishable by fine and imprisonment, and in some cases avoids the election and works disqualification and disfranchisement of a far-reaching character.

Consonant with the law in criminal cases, the Acts give to the trial judges, the jurors as it were, the power to convict, but never to a Court of Appeal, upon an appeal, except in confirmation of the verdict at the trial.

[The foregoing words were written and handed in as my opinion at the close of the argument, on the 9th January, 1903. Since then, and while under consideration in this case, the same questions have been argued before this Court, differently constituted, in another case. It is needful, lest it seem as if there were concurrence in such a course of procedure, to express my disapproval of it; its obvious inconveniences and danger of

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abuse are none the less because it has proved at least harmless in this instance.]

MACMAHON, J., agreed in dismissing the appeal for the reasons stated in the judgment of GARROW, J.A.

In the *South Oxford* Provincial Election, the trial Judges (Street and Britton J.J.) having disagreed as to two charges of corrupt practices, the petitioner appealed to the Court of Appeal when a similar objection was taken to the jurisdiction of the Court to hear the appeal. The appeal was heard by Moss, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, J.J.A. when Osler, J.A. alone gave reasons in writing for coming to the conclusion, that the petitioner's appeal did not lie. The following is his judgment:—

March 6, 1903.—OSLER, J.A.:—The learned trial Judges differed in opinion on two charges of corrupt practices: one a personal charge against the respondent; the other a charge against an agent; and the petitioner appeals, contending that both should have been found proved. One of the trial Judges having found that both charges were established, and the other having found that they were not; and each of them having based his conclusion on the credibility of the several witnesses, as it appeared to him, the appeal, in effect, removes the trial of these charges into this Court to entertain it as a matter of original jurisdiction, there being no judgment or finding of the trial Judges thereon which is sought to be reversed.

In my opinion the appeal is not competent.

An appeal lies by the respondent from a finding judgment or decision (embodied in the final disposition of the petition) that he, or an agent of his, *has been guilty* of corrupt practices, sections 37 and 66 (1), The Ontario Election Act; sec. 179 (last part) The Ontario Election Act. The only way in which such a result can be arrived at, is, by the concurrent judgment of the two Judges by whom the election petition has been tried: sec. 171 (2) The Ontario Election Act, "No candidate or other person is to be disqualified or subject to any disability or penalty for any corrupt practice, or alleged corrupt practice, without the concurrent judgment to that effect of the two Judges by whom the election petition is tried. This applies to the preceding subsection and to the conditions and circumstances therein mentioned, as well as to other matters on which corrupt practices or the consequences thereof in any way depend."

The "preceding sub-section" is the only enactment which declares what consequences shall follow in respect of the election, if corrupt practices are proved, and what are the conditions attaching to adjudication of proof. "Where it is found *upon the report of the Judges* upon an election petition, that any corrupt practice has been committed by a candidate at an election, or by his agent, whether with or without the actual knowledge and consent of the candidate, the election of the candidate \* \* \* shall be void."

This section appears to me to be a clear and positive enactment, that corrupt practices only void an election where they are adjudicated upon and found proven by the concurrent judgment of the trial Judges, and are so reported upon by them.

There is no appeal from the decision of the trial Judges' finding that a candidate or other person has not been guilty of corrupt practices, sec. 57 (6) The Ontario Controverted Elections Act.

To hold that an appeal lies when they differ, and that the Court of Appeal may find the corrupt practices proved, and avoid the election, would be, to go in the teeth of section 171, of The Ontario Election Act, and to declare that the election may be avoided for corrupt practices although it has not been found by the report of the trial Judges that corrupt practices have been committed.

Whether the concurrent judgment of the trial Judges as to persons other than the candidate, that they have been guilty of corrupt practices, is a necessary preliminary to any prosecution under section 177 (1), need not be decided; but it may be pointed out that the trial Judges at the trial of the petition, or any two of the Judges on the rota for the trial of petitions, or any Judge of the High Court for the trial of civil or criminal causes, are constituted a Court for the trial of all corrupt practices and other illegal acts committed during an election: The Ontario Election Act, secs. 187, 188, and that if the party charged is acquitted, or if the Judges disagree where the trial takes place before two Judges at the trial of the petition, or afterwards upon a summons, no provision is made for an appeal: The Ontario Election Act, sec. 188, sub-secs. (2) (3) (4); The Controverted Election Act, sec. 118; *Lennox Provincial Election* (1885), 1 E. C. 422.

I think that the policy and intent of the Legislature, as declared by these provisions and sec. 171 of The Election Act, is, that the avoidance of the election for corrupt practices, as well as the consequences to the person charged with their commission, when tried before two Judges, is to result only from the concurrent finding or judgment of the trial Judges that such corrupt practices have been committed. If they agree in finding that they have not been, or if they cannot agree in finding that they have, there is no appeal, and the election and return of the candidate, as regards the charge of corrupt practices, are unaffected. Those provisions of The Ontario Election Act which seem to imply an appeal in all cases of disagreement, must be controlled by the clear terms of section 171, and they have full effect given to them, by confining their operation to differences of opinion in respect of other matters, which may avoid an election. The language of sec. 58 of The Controverted Elections Act, it may be noted, implies that there may be a case of disagreement in which the party is not entitled to go to the Court of Appeal.

The Election Act, and The Controverted Elections Act, are, of course, to be read in *pari materid*.

I do not think that much light is thrown upon their construction, as we now find them, by a scrutiny of the previous legislation, much of which is of an extremely disjointed, inconsecutive character, abounding, as indeed do the present Acts in verbal and practical inconsistencies. Our duty is to construe the Acts as we now have them; and if there are not clear words conferring the right of appeal, we are bound to disclaim jurisdiction. If, however, we may look at sec. 48 of The Election Law Amendment Act of 1884, 47 Vict. ch. 4 (O); and secs. 18 and 19 of The Franchise Act of 1885, 48 Vict. ch. 2 (O) we see there evidence of a struggle to express an intention that corrupt practices should only be established by the "concurrent judgment" or "joint decision" of the Judges who try the petition. This is now declared very

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plainly by The Ontario Election Act, sec. 171, though the draftsman has failed to restrict the generality of, or to omit some words or expressions in The Controverted Elections Act, which, taken by themselves, might seem to be inconsistent with that declaration.

Moss, C.J.O., Maclellan and Garrow, JJ.A, adhering to the judgment of the Court in the *Lennox* case: MacLaren, J.A., dissenting as in that case, the appeal was dismissed with costs.

See now 3 Edw. VII. ch. 7, sec. 5.

G. A. B.

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[STREET, J.]

## ST. LAWRENCE STEEL AND WIRE CO. v. LEYS.

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July 4.

*Principal and Surety—Guarantee—Construction of—Future Indebtedness.*

A firm being indebted to the plaintiffs for goods supplied, on ordering further goods received from plaintiffs the following telegram: "Let M. L.," the defendant, "wire guarantee for payment of all accounts to us, and everything will be satisfactory," to which the defendant, without apparently having seen the telegram, but having been informed of its contents, telegraphed in reply, "will guarantee payment of all accounts" for the firm:—*Held*, that the guarantee was a continuing one and that defendant was liable for accounts incurred or to be incurred.

THIS was an action on a guarantee which was tried at London on June 15, 1903, before STREET, J., without a jury.

*Watson*, K.C., for the plaintiffs.

*Gibbons*, K.C., for the defendant.

The facts appear in the judgment.

July 4. STREET, J.:—The Wray Corset Co. was a partnership carrying on business at London, Ont., the members of which were Richard Wray and Allen Leys, the latter being a son of the defendant, F. B. Leys. They from time to time ordered goods from the plaintiffs and had been irregular in paying the drafts upon them. They were indebted to the plaintiffs for the amount of certain goods which they had received, and had ordered other goods, which the plaintiffs objected to sending. On May 10, 1901, the plaintiffs telegraphed to the Wray Corset Co. as follows: "Let Mr. Leys wire guarantee for payment of all accounts to us and everything will be satisfactory."

I do not think it is proved that this telegram was ever actually shewn to the defendant, but he was informed in general terms of its contents, and he authorized the Wray Corset Co. to send a telegram to the plaintiffs in the following words: "Will guarantee payment of all accounts for Wray Corset Co. F. B. Leys," upon being informed by the Wray Corset Co. that certain goods ordered by them of the plaintiffs were detained until payment should be guaranteed by him.

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The goods then under order were sent on by the plaintiffs on receipt of this telegram and were afterwards paid for by the Wray Corset Co., and they also paid for all the goods for which they owed the plaintiffs at the time the guarantee was given: but they continued to deal with the plaintiffs until they stopped payment some months afterwards. They were then indebted to the plaintiffs in the sum of some \$650 for goods purchased by them from the plaintiffs after the date of the guarantee, and they claimed payment of it from the defendant.

At the trial I disposed of certain questions of fact which were raised, and I reserved only the question as to the defendant's liability upon his guarantee for orders given by the corset company for goods subsequent to its date.

The question to be determined is one of construction of the guarantee, and as the language used is by no means clear it is proper in construing it to take into consideration the circumstances under which it was given. The case is a somewhat singular one, by reason of the fact that the guarantee itself is the only communication of any kind, either written or verbal, which passed between the plaintiffs and the defendant until after the Wray Corset Co. had suspended payment. The defendant swears that he knew nothing of the business of the Wray Corset Co., excepting what he was told by his son and Wray when they came to him on May 10 with a telegram or letter from the plaintiffs. His recollection of the matter was that they told him there was a shipment of goods which they wanted from the plaintiffs and which the plaintiffs refused to send without a guarantee, and that he thereupon authorized them to send a guarantee in his name. He appeared to have forgotten all about the matter until payment was demanded by the plaintiffs after the failure of the corset company, when a copy of his telegram was sent him by the plaintiffs, and he did not then repudiate it. His memory is not at all to be depended on as to the circumstances under which the telegram signed with his name was sent to the plaintiffs. To have authorized the sending of it he must have been first made aware that the corset company was purchasing goods from the plaintiffs, and it is not shewn that he knew anything more. The correspondence between the plaintiffs and the corset company, which I think

certainly was not known to the defendant, shews that the plaintiffs were not satisfied with the financial soundness of the corset company, and had in their letter of May 6, 1901, almost definitely declined to give further credit to the corset company without some guarantee that their account would be met. The plaintiffs' telegram to the corset company was called forth by a fresh order of goods while those which had been supplied were still unpaid for. It was to the same effect in substance as their letter of May 6: "We cannot go on supplying you with goods without a guarantee from Mr. Leys," and straightway came back the defendant's telegram: "Will guarantee payment of all accounts for Wray Corset Co."

In ascertaining the extent of the defendant's engagement the rule of construction to be applied is that the language being that of the defendant himself should be construed rather in favour of the other party, because it was the duty of the defendant in framing it to be careful so to frame it as not to mislead the person to whom it was addressed. At the same time the defendant's liability must not be extended beyond the limits of the language he has used, but the words used are to be read as strongly against him as the sense will admit of: *Mason v. Pritchard* (1810), 12 East 227; *Hargreave v. Smee* (1829), 6 Bing. 244, 248; *Mayer v. Isaac* (1840), 6 M. & W. 605; *Wood v. Priestner* (1866), L.R. 2 Ex. 66; *Blest v. Brown* (1862), 4 DeG. F. & J. 367, 376.

I have come to the conclusion that the plaintiffs were justified in placing upon the defendant's telegram the construction they now contend for, and upon which plainly they have acted since receiving it, viz., that it was a guarantee of payment of all accounts, future as well as past, incurred or to be incurred by the corset company. It is a promise to guarantee expressed in the future tense, and it is made as extensive as possible by the word "all." As to the word "accounts," it is readily applicable to accounts to be incurred in the future as well as to those which have been incurred in the past.

There must therefore, in my opinion, be judgment for the plaintiffs against the defendant for \$556.53, with interest from September 18, 1902, on \$516.37, and costs of the action.

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## RE McRAE ESTATE.

July 2.

*Chose in Action—Equitable Assignment—Form of.*

No writing or any particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest being all that is required.

*Hughes v. Chambers* (1902), 22 C.L.T. 333 approved.

A client, who was indebted to a solicitor for costs incurred, informed him that, on the receipt by him of certain moneys, which he was instructed to collect for the client, he was to pay certain obligations, including his own bill of costs:—

*Held*, that this constituted a good equitable assignment.

THIS was an appeal from the decision of the Master at Ottawa.

On January 13th, 1903, on the application of the Ottawa Trust and Deposit Company, administrators of the estate of the late J. W. McRae, an order was obtained for the taxation of a solicitor's bills of costs by the said Master.

There were in all four bills of costs, but the only one now in question was for \$335.92, which was incurred in an action brought by the Union Bank against J. W. McRae, in which the solicitor acted for Mr. McRae.

The question was whether the solicitor was entitled to deduct the amount of these costs from the sum of \$338.80 received by him on the 15th November, 1902, from the administrators of the estate of the late Judge Rouleau. These costs were incurred during Mr. McRae's lifetime, but no bill had been ever rendered by the solicitor therefor.

In October, 1901, the solicitor was also retained by Mr. McRae to collect certain moneys due him by the Rouleau estate. These moneys had not been collected at the time of Mr. McRae's death, but were afterwards collected by the solicitor, who was subsequently retained by the Trust Company, who had also been appointed administrators of the Rouleau estate.

McRae died insolvent, and his estate was being administered by the Court. The solicitor did not file any claim against the McRae estate, but claimed that he had a general lien for his



costs and was therefore entitled to set up this lien against the moneys he had collected from the Rouleau estate, and which he had in his hands, or that he was entitled to set off the amount of these costs against the said moneys in his hands, or that he was entitled to be paid these costs out of the said moneys by virtue of an equitable assignment thereof made to him, and in proof thereof gave evidence of a conversation between himself and Mr. McRae during Mr. McRae's lifetime, when Mr. McRae told him that when he should receive these moneys from the Rouleau estate he wished him, in the first place, to pay the interest due on a certain mortgage, then to pay himself the costs which he (McRae) owed him, and then to pay one Derocher half the amount he owed him, and then to account to him (McRae) for the balance.

The Master found against the solicitor, and directed him to pay over the amount claimed to be retained by him for the said costs.

From this judgment the solicitor appealed to a Judge sitting in Weekly Court.

On the 15th June the appeal was heard before BRITTON, J., at Ottawa.

*R. V. Sinclair*, for the appellant.

*J. F. Smellie*, for the estate.

July 2. BRITTON, J.:—The learned Master has given carefully prepared reasons for his decision. With great respect I am unable to agree.

The evidence of Mr. Sinclair, corroborated as I think it is, establishes a good equitable assignment of so much of the existing fund as would pay the debt due to the solicitor.

The fact that the bills of costs had not been rendered by Mr. Sinclair appears to me not material. Mr. McRae knew that a substantial sum was owing. The costs had been incurred, and there was the liability for these costs—amount subject to taxation.

The full Court in Manitoba, in the case of *Hughes v. Chambers* (1902), 22 C.L.T. 333, at p. 334, decided that "to

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constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required. Any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient."

The case of *Palmer v. Culverwell, Brooks & Co.* (1902), 85 L.T.N.S. 758, is in point. In that case an order was given by a debtor to his solicitor to collect the debt and pay a third party.

If there is evidence to warrant the finding as to what occurred between the deceased and Mr. Sinclair, then the language of Bruce, J., at p. 759, is applicable to this case: "As a matter of principle, when it is once established that a debt due and owing may become the subject of equitable assignment, and the person to whom the debt is due directs his agent, who is authorized to collect the debt, to hand it over to a person to whom the person to whom the debt is due owes money, and that person informs the agent that he has received the order, it seems to me that a state of things has been created which renders it inequitable for him or his agent to disregard the order and apply the proceeds of the debt in any other way."

If the fact is established can it make any difference that the agent collecting the debt is himself a creditor to whom the equitable assignment is made? As to corroboration, see *Re Curry* (1900), 32 O.R. 150; *Green v. McLeod* (1896), 23 A.R. 676.

The appeal should be allowed.

As the appellant argued the case in person, the appeal should be allowed without costs, and there should be an order for paying over the difference, the Ottawa Trust and Deposit Company to be paid costs as between solicitor and client out of this money to be paid over.

G. F. H.

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## [DIVISIONAL COURT.]

## WAECHTER V. PINKERTON ET AL.

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July 11.

*Assessment and Taxes—Statute Labour—Separate Assessment of Distinct Lots—Assessment Act, sec. 109.*

Section 109 of the Assessment Act, which in effect provides that if the assessment is for more than 200 acres "the statute labour shall be rated and charged against every separate lot or parcel according to its assessed value," is imperative, and not merely directory.

Where, therefore, on an assessment of 600 acres instead of the amount chargeable against the several lots owned by the plaintiff being rated and charged against each of such lots, a bulk sum was assessed for statute labour and charged against the whole of them, such assessment was held invalid.

*Love v. Webster* (1895), 26 O.R. 453, followed.

THIS was an action of replevin brought in the county court of the county of Bruce by the plaintiff, Andrew Waechter, against Thomas Pinkerton, the collector of taxes for the township of Greenock for 1902, and Ezra Briggs, the collector's bailiff.

The bailiff, under a warrant from the collector, seized a horse and seven calves, the property of the plaintiff, to satisfy the taxes for 1901, charged against the plaintiff's lands. The plaintiff resided in the township of Brant, but was the owner of lots 1, 2, 3 and 5, in concession A, of the township of Greenock. The townships were adjacent, and both in the same county.

These lots were assessed as follows:—

No. 269.	Frank Waechter, lot 1, con. A . . . .	\$2,100 <sup>00</sup>
" 270.	Samuel Waechter, " 2, " . . . .	2,200
" 271.	Wm. Waechter, " 3, " . . . .	2,500
" 272.	Andrew Waechter, " 5, " . . . .	800
		<hr/> \$7,600

The plaintiff himself requested that the lots be so assessed to his sons and himself.

The statute labour for which this property was liable under the statute and by-law of the township council was sixteen days. One day's work had been done, leaving fifteen days. The statute labour not performed was commuted at \$1 per day.

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The defendant collector received his roll in due course, and upon the roll these lands were entered as follows:—

A. Waechter and Sons . . . . .	{	Concession A, lot 1 . . . .	\$2,100
		“ “ 2 . . . .	2,200
		“ “ 3 . . . .	2,500
		“ “ 5 . . . .	800
			<hr/>
			\$7,600

and extended to the right in proper column.

Township rate.	Commutation.	School.	Total.
\$38.	\$15.	\$30.40.	\$83.40.

The plaintiff was willing to pay \$68.40, but disputed the statute labour commutation tax.

The plaintiff was willing to do statute labour, but not under the road-overseer of the division in which his land was. He point blank refused to do the statute labor, and when the commutation tax was demanded he refused to pay.

On January 15, 1902, Pinkerton signed and delivered a warrant to the defendant Briggs to distrain the chattels of the plaintiff on these lots for \$83.40 for taxes, on the collector's roll for the year 1900. The bailiff seized on January 21, 1902. He did not remove the stuff so seized, but left it on the premises, taking a receipt from plaintiff's son, Samuel Waechter, for it, and undertaking to hold the stuff seized subject to the demand of Briggs.

On January 25 the bailiff gave notice of sale for February 11, at 2 p.m. The plaintiff issued his writ of replevin on January 27, 1902.

The action was tried in the county court of the county of Bruce on June 17, 1902, and the learned County Court Judge found in favour of the plaintiff.

BARRETT, Co. J.:—The action is one in which an order was made to replevy the goods seized by the defendants, as collector and bailiff, for taxes claimed to be due the township of Greenock.

Under the pleadings I held the burthen of proof to be on the defendants to prove that everything had been done which



ought to have been done to entitle the collector to seize for the taxes; and I think they have sufficiently proved that everything has been so done except compliance with section 109 of the Assessment Act, which provides that in all cases, both of residents and non-residents, the statute labour (part of the taxes seized for) shall be rated and charged against every separate lot and parcel according to its assessed value; excepting that, under sub-sec. 2 of that section, when a person is assessed for not more than 200 acres it may be rated and charged as if the same were one lot; but as the assessment in this case is for more than 200 acres the exception does not apply.

Unless, therefore, sub-sec. 1 of sec. 109 is directory only the defendants require to establish that each lot was rated and charged separately according to its assessed value.

The Interpretation Act provides that the word "shall" which is used in sec. 109, shall be construed as imperative; but so frequently has its use been held only directory that its imperative interpretation has almost been obliterated; but I think some good reason must exist before holding it merely directory: *The Town of Trenton v. Dyer* (1893), 21 A.R. 379, at pp. 388-9, where the words of Baron Martin, in *Bowman v. Blyth*, 7 E. & B. 48, are quoted by Chief Justice Hagarty.

There are many reasons, it seems to me, why it should not be held merely directory in this case. The owner ought to have a right to deal with each lot or parcel of his land burthened only with the taxes against it, and if proceedings for the sale of the land for taxes had to be taken each parcel should be sold for the taxes against it alone.

If after the assessment the plaintiff had sold 100 acres of the 600 in question to six different purchasers and the taxes were returned against the lands to the county treasurer, no one of the purchasers could free his portion without paying for the other 500 acres.

It is contended that *Cook v. Jones* (1870), 17 Gr. 488, is an authority that the provision that statute labour shall be rated and charged upon each separate parcel is only directory, but I do not think so. That case only refers to taxes being kept separate as to one lot, there being no more taxes charged than

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there should be but not properly specified, and *Coleman v. Kerr* (1867), 27 U.C.R. 5, at p. 13, seems against it.

The only evidence in this case as to the rating and charging the statute labour against the plaintiffs' 600 acres is that their lands, taken together, are liable to \$15, and this appears only on the collector's roll—no entry in any book of the municipality is made shewing any separate charging or rating.

The plaintiff offered to pay all his other taxes, amounting to \$68.40, which the collector refused to accept; and I think he was wrong in so doing, even if he had the right to collect the statute labor, and certainly wrong if he had not, as I find—for I think the other taxes and the statute labour tax distinct and separate demands.

I think the plaintiff is entitled to his costs, for although he did not resist payment of his statute labour upon any legal ground, yet before the defendants contested this suit they should have made certain that the proceedings to enable them to collect the tax by seizure had been properly taken.

The judgment will therefore be for the plaintiff for nominal damages with costs, no evidence being given of actual damage.

From this judgment the defendants appealed to the Divisional Court.

On December 8 and 9, 1902, before a Divisional Court composed of FALCONBRIDGE, C.J.K.B., and BRITTON, J., the appeal was argued.

*G. F. Shepley*, K.C., for the appellants. Replevin does not lie here. The plaintiff at the time the distress was made admitted that he was liable for taxes then due on the lands upon which the distress was made, so that there was a liability to distress apart from the amount claimed to be due for statute labour. The plaintiff has been in no way prejudiced. The taxes for the statute labour were, however, properly imposed. It is not necessary that the taxes should have been distributed *pro rata* on each lot. Sec. 109 is directory merely and not imperative, and therefore the fact that its terms had not been strictly complied with would not render the distress illegal. *Cook v. Jones* (1870), 17 Gr. 488, is expressly in point, and it has never been questioned. The County

Judge referred to *Town of Trenton v. Dwyer*, 21 A.R. 379, at p. 388. That case is clearly distinguishable. There the roll had not been certified by the clerk, and so there was no roll upon which to found the taxes. There was no sufficient tender to enable the action to be brought. A tender of part is not sufficient.

*J. Idington*, K.C., contra. The proper construction of sec. 109 is that its provisions are imperative, and not merely directory. *Cook v. Jones* does not go the length contended for, but even if it did, the cases decided subsequently to *Cook v. Jones* do not follow that case, but are based on the principles laid down in *Town of Trenton v. Dwyer*: *Caston v. Corporation of the City of Toronto* (1899), 26 A.R. 459. See also *Munro v. Grey* (1854), 12 U.C.R. 647; *Ridout v. Ketchum*, 5 C.P. 50; *McDonald v. Robillard* (1863), 23 U. C. R. 105; *Laughtenborough v. McLean* (1864), 14 C.P. 175; *Coleman v. Kerr* (1868), 27 U.C.R. 5; *Thompson v. Colcock* (1874) (1855), 23 C.P. 505. The distress was improperly made. See R.S.O. 1897, ch. 224, secs. 135 and 137.

*Shepley*, in reply. The cases referred to by the other side when looked at do not in any way weaken the force of *Cook v. Jones*. They were all decided on principles which distinguished them from that case, and therefore it must be still considered in force and binding on this Court.

July 11. BRITTON, J.:—No objection was taken at the trial, and apparently it was not noticed, that the collector's warrant to the bailiff is to levy the taxes for 1900 instead of 1901. That was manifestly a mere mistake, and in the view I take of the matter it now makes no difference.

There appears to be no ground for interfering with the findings of the learned County Judge upon questions of fact. He has expressly found that there was a tender of all taxes except that for statute labour; in fact the defendants concede that such a tender was made, but contend that tender of part was no valid tender. There is no doubt that tender of part of one entire demand, or entire contract debt or liability, is inoperative: See *Dixon v. Clark* (1848), 5 C.B. 365; but if a tender is specifically made as to one distinct item, in an account fairly divisible into items, or parts, it is a good tender as to that

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item. Whether there was specific appropriation by the plaintiff when making the tender is a question of fact, and the Judge has found the fact in the plaintiff's favour. See *Hardingham v. Allen* (1848), 5 C.B. 793.

This leaves but the one question to be disposed of, namely: Can there be distress for statute labour commutation when the amount for which several lots are liable is put down in gross against them all, instead of being rated and charged against every separate lot and parcel, as required under sec. 109 of the Assessment Act?

I think the decision appealed against is right. The provision of sec. 109 as to special apportionment of the statute labour tax is imperative and not merely directory. In the case of resident and non-resident, the words of the section are: "The statute labour shall be rated and charged against every separate lot or parcel according to its assessed value."

The case of *Love v. Webster* (1895), 26 O.R. 453, is in point in plaintiff's favour, and the decision in the present case is only following the principle there laid down.

In the event of there being no distress upon any of plaintiff's lots, I am of opinion that a sale of these lots, or any of them, could not be validly made for this unapportioned tax, or for any part of it where not apportioned on the roll.

Apart from the legal objection as to mode of rating, the plaintiff had no reason for refusing to do this road work or to pay the commutation charged. He was not hurt in any way. He owned all the land. He gave his own valuation of each parcel to the assessor. The amount was much less than the statute would authorize. The plaintiff was annoyed with the regularly appointed pathmaster, George Fisk, and refused to recognize his authority, or to do work under him, and then refused to pay. This has led to litigation, which has resulted successfully to plaintiff by reason of the mistake of officers of the township of Greenock.

If the taxes which the plaintiff admits and for which he tendered the \$68.40 have not been paid, as apparently they have not, the township should not lose them, and as the township has indemnified the collector this amount should be set off, if defendants wish it, against plaintiff's costs.



If there should be any difficulty about the lien for costs of plaintiff's solicitor, an application may be made in the matter.

Appeal dismissed with costs.

FALCONBRIDGE, C.J., concurred.

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[STREET, J.]

McFADDEN V. BRANDON.

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July 4.

*Limitation of Actions—Cause of Action—Commencement of—Statutory Mortgage  
—Acceleration of Payment of Mortgage Money.*

The effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured, the principal thereby secured should become payable, is to make the principal at once due, so that the cause of action then accrues under sec. 1 of ch. 72, R.S.O. 1897, "An Act respecting the Limitation of certain Actions.

THIS was an action tried before STREET, J., (without a jury) at London on June 16th, 1903, and was brought to recover the principal and interest upon a covenant made by the defendant contained in a mortgage of land in Ontario from the defendant to the plaintiff, dated March 15th, 1879. The proviso in the mortgage was that it should be void on payment of \$600, with interest at 8 per cent. at the expiration of five years, with interest in the meantime at the same rate, payable yearly on March 15th in each year, the first payment of interest to be made on March 15th, 1880. The mortgage was expressed to be made in pursuance of the Act Respecting Short Forms of Mortgages, and contained the usual statutory covenant for payment of the mortgage money and interest, and the provision "that in default of payment of the interest hereby secured the principal hereby secured shall become payable." The action was begun on May 5th, 1903.

No sum had ever been paid for principal or interest on the mortgage.

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The defendant pleaded that the cause of action arose more than twenty years before the action was begun, and referred to Chapters 72 and 133 R.S.O. 1897, in support of his defence.

*E. Meredith*, K.C., for plaintiff.

*Purdum*, K.C., for defendant.

July 4.—STREET, J.:—By the contract of the parties to this covenant the failure of the defendant to pay the instalment of interest which became due on March 15th, 1880, accelerated the payment of the principal, which immediately upon such default became “due and payable in like manner and with the like consequences and effects to all intents and purposes whatever,” to quote the language of column two of the Short Forms of Mortgages Act which is to be read into this covenant, “as if the time herein mentioned for payment of such principal money had fully come and expired.”

This provision, it is held, is to be treated as the contract of the parties, and the party taking advantage of it is not to be treated as claiming a penalty or forfeiture but only as enforcing his contract: *Wallingford v. Mutual Society* (1880), 5 A.C. 685; *Wilson v. Campbell* (1893), 15 P.R. 254; *Graham v. Ross* (1883), 6 O.R. 184.

The plaintiff was clearly entitled to have brought his action to recover both principal and interest upon his contract on March 16th, 1880, and his cause of action having then arisen he appears to be barred by sec. 1 of ch. 72 R.S.O. 1897, which provides that actions upon a bond or other specialty except upon the covenants contained in any indenture of mortgage made on or after July 1st, 1894, shall be commenced within and not after twenty years after the cause of action arose.

In so deciding I follow the decisions of *Hemp v. Garland* (1843), 4 Q.B. 519; and *Reeves v. Butcher*, [1891] 2 Q.B. 509.

I do not omit to consider the fact that the covenant in the present case differs from the contracts in the two English cases to which I have referred in this, that it contains a term not found in them that upon payment before judgment of the arrears of interest and costs, the mortgagor shall be relieved from the effect of his default. It is plain, however, that the

cause of action for the recovery of the principal money and accrued interest did arise upon the default, although the contract permitted the defendant to do away with the stipulated consequences of the default, and to restore the original terms of payment, by doing something which has not been done in the present case. I have therefore been unable to see that the effect of the provision in question is such as to distinguish the case before me from those to which I have referred.

The action must be dismissed with costs.

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[MEREDITH, C.J. C.P.]

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SAUNDERS V. BRADLEY.

July 27.

*Trusts and Trustees—Will—Appointment of New Trustee—Construction—Survivorship.*

A testator appointed two of his brothers executors and trustees of his will, and provided that in the event of either dying "then my surviving brothers and sisters or a majority of them shall appoint a new trustee." He died in 1899, and afterwards, in the same year, one of the executors died, and also another brother. In 1900 a majority of the brothers and sisters still living appointed the plaintiff trustee in place of the deceased trustee:—*Seemle*, that the appointment was valid, for that it was the survivors of the brothers and sisters at the time of exercising the power to appoint who were entitled to exercise the power.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at Sarnia, on April 9th, 1903. The nature of the action and the facts in evidence are stated in the judgment.

A. B. Aylesworth, K.C., and F. W. Kittermaster, for the plaintiff, cited *In the goods of Langford* (1867), 1 P. & M. 458.

W. R. Riddell, K.C., and H. J. Dawson, for the defendant, contended that 'survivors' meant those who survived the testator, and cited Theobald on Wills, 4th ed., pp. 554, 556-7; Jarman on Wills, 6th ed., p. 1548.

July 27. MEREDITH, C.J.: The plaintiff claiming to be a co-trustee with the defendant, under the provisions of the will of Richard I. Bradley, deceased, brings this action to compel the defendant to permit him to assist in the management and control of the business of the estate of the testator and "of the trusts of" his will, and for "a declaration as against the defendant that he (the plaintiff) is a trustee under the terms of the said will."

The plaintiff's title to the office of trustee, which he sets up, depends upon the validity of his appointment which was made on the July 31st, 1900, by an instrument in writing executed by a majority of the brothers and sisters of the testator who were then living.

The defendant attacks the validity of this appointment on the ground, amongst others, that the power which the will gives



for the appointment of a new trustee in the events which have happened never came into existence, and if it did that the persons who executed the instrument of appointment did not constitute a majority of "the surviving brothers and sisters" of the testator according as they contend, on the true construction of the power, those words are to be interpreted.

I was asked by counsel to try this question first, and I consented to do so, and practically directed, under the provisions of Consolidated Rule 373, that it should be tried before the other issues in the action.

By the third paragraph of the will the testator appointed his brothers William J. Bradley (the defendant) and Edward Bradley his executors and trustees of the trusts created by the will, and the provision for the appointment of new trustees is in these words :

"In the event of the death, or the inability or refusal to act, of either of said trustees, then my surviving brothers and sisters, or a majority of them, shall, by an instrument in writing, executed in the manner in which conveyances of real property are required to be executed in the said Province of Ontario, Canada, appoint a new trustee to act in the place of such deceased trustee or in the place of such trustee who shall be unable or who shall refuse to act, and such instrument shall be recorded in the office of the Registrar of Deeds for the county of Lambton in the said Province of Ontario, and such new trustee shall, from the date of such record, be vested with all the authority and be subject to all the trusts and obligations herein granted to and imposed upon said original trustees."

The testator died on March 27th, 1899. His will was proved by his two executors, and probate of it was granted to them on May 19th, 1899.

Edward Bradley died on July 28th, 1899.

The brothers and sisters of the testator who survived him were seven in number, all of whom are living except Edward and a brother, John H., who died on August 19th of the same year.

Of the then five surviving brothers and sisters of the testator, three, viz., Mary Jane Saunders, Maggie M. Palmer, and Eliza Ann Campbell, executed the instrument by which the

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plaintiff was appointed to be a trustee in the room and stead of Edward.

The first objection taken by the defendant is that the power of appointment never became operative because both of the trustees appointed by the will survived the testator and the power, as the defendant contends, applies in the case of death, only to death in the testator's lifetime.

Apart from authority I should have reached the conclusion that this contention is not well founded, and that the power became operative in case either of the events provided for happened, whether in the lifetime of the testator or after his death.

Vice-Chancellor Shadwell, so far from thinking that such a power applied only to the events happening in the lifetime of the testator, was of opinion that it did not so apply, but might be exercised only if the event happened after his death : *Walsh v. Gladstone* (1844), 14 Sim. 2 ; *Winter v. Rudge* (1847), 15 Sim. 596.

The Vice-Chancellor's view was not, however, finally adopted, and it has since been held that such a power is exercisable whether the event happens in the lifetime of the testator or after his death : *In re Hadley* (1851), 5 DeG. & Sm. 67 ; *Nicholson v. Wright* (1857), 26 L.J.N.S. Ch. 312 ; *S. C. sub nom. Nicholson v. Smith* (1857), 3 Jur. N.S. 313 ; *Noble v. Meymott*, (1851), 14 Beav. 471, 477 ; and that is now the settled law on the subject, and in the statutory powers conferred by the Imperial Statutes, 23 & 24 Vict., ch. 145, sec. 27, and 56 & 57 Vict., ch. 53, sec. 10, as well as that conferred by our statute, R.S.O. 1897, ch. 129, sec. 4, sub-sec. 2, the doubt that existed has been guarded against by express enactment : *Lewin on Trusts*, 10th ed., p. 778 ; *Perry on Trusts*, 5th ed., sec. 291.

It was further contended by the defendant's counsel that in any case it was the brothers and sisters who survived the testator or a majority of them, or, at all events, those who survived the deceased trustee, Edward, or a majority of them, who were entitled to exercise the power, and if either of these views is entitled to prevail the plaintiff's appointment was, of course, invalid, as in the one case, as seven survived the testator,

and in the other, six, survived Edward, it was necessary that four at least should join in making the appointment.

I see no reason for limiting the words of survivorship as contended for, but am of opinion that, having regard to the object of the provision in question—that there should be two trustees acting in the execution of the trusts of the will—the survivors at the time of exercising the power, or a majority of them, is what is meant, and the reasons which led to the adoption of the rules for determining at what period survivors are to be ascertained for the purpose of deciding who are entitled to take real or personal property under the provisions of a will, appear to me not to be applicable. The word “then,” which the testator uses, as I read the will, does not refer to time, but is the equivalent of “in that case.”

I was not referred to and have been unable to find any case in which the precise question has been raised and determined.

Had the words been “my brothers and sisters,” omitting the word “surviving,” the weight of authority is in favour of the view that those who answer the description at the time it is desired to exercise the power may properly exercise it: *Sohier v. Williams* (1853), 1 Curtis, C.C. 479; Perry on Trusts, 5th ed., sec. 294; Sugden on Powers, 8th ed., 128; Lewin on Trusts, 10th ed., p. 718; *Brassey v. Chalmers* (1853), 4 DeG. McN. & G. 528; and *Jefferys v. Marshall* (1870), 19 W.R. 94. *Sykes v. Sheard* (1863), 2 DeG., J. & S. 6, is, however, opposed to this view.

This does not perhaps assist very much in coming to a conclusion upon the point in issue in this case, though the reasoning of Mr. Justice Curtis in *Sohier v. Williams* seems to me to warrant the giving of a liberal construction to the words of the power so as to enable the surviving brothers and sisters for the time being to fill the vacancy in the office of trustee, for which the testator was providing.

It follows from what I have said, that the power of appointment was, in my opinion, exercisable by the brothers and sisters of the testator who were living at the time the instrument of appointment was executed, but I do not purpose pronouncing formal judgment at present, because of a doubt I entertain as to whether the proper parties are before the Court to enable it

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to pronounce a binding judgment. None of the *cestuis que trust*, except the defendant, is a party to the action, and it seems to me that it is at least open to doubt whether any judgment should be pronounced in their absence. This point was not raised before me, and not having heard any argument upon it, I should not, I think, deal with it without hearing counsel.

The case must, therefore, stand over for argument on this point, unless it can be arranged that some of the *cestuis que trust* be made defendants. In that case, if the added defendants, who should be appointed to represent all the *cestuis que trust*, desire to be heard, the case must be re-argued, but if they do not and are content to rest their case on the argument which has been presented on behalf of the present defendant, I may then pronounce the formal judgment.

A. H. F. L.

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[MEREDITH, C.J.C.P.]

## FARMERS LOAN AND SAVINGS COMPANY v. PATCHETT.

1903

July 27.

*Principal and Surety—Assignment of Mortgage—Covenant of Assignor for Payment of Mortgage — Discharge of Part of Land Mortgaged—Release of Assignor.*

The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt :—

*Held*, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at Toronto, on May 27th, 1903.

The nature of the action and facts in evidence are stated in the judgment.

*W. M. Douglas*, K.C., for the plaintiffs, cited *Holmes v. Brunskill* (1878), 3 Q.B.D. 495, 507; *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596; *Molsons Bank v. Heilig* (1895) 26 O.R. 276; *Land Security Company v. Wilson* (1895), 22 A.R. 151; *Rudge v. Richens* (1873), L.R. 8 C.P. 358.

*W. H. Irving*, for the defendant Coleman, cited *Gowland v. Garbutt* (1867), 13 Gr. 578; *Forster v. Ivey* (1901), 2 O.L.R. 480.

July 27. MEREDITH, C.J.:—The action is brought as against the defendant Coleman on a covenant entered into by him with the plaintiffs on the assignment by him to them of an indenture of mortgage bearing date June 3rd, 1889, from the defendant Patchett to the defendant Coleman, securing the payment of \$400, and interest at the rate of seven per cent. per annum on Lot No. 18 on the west side of Fairview Avenue, in the town of Toronto Junction, as shewn on registered plan No. 783.

The assignment is dated June 28th, 1889, and the covenant sued on is contained in it, and is in the words following: "The said assignor (the defendant Coleman) for himself,

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his heirs, executors, administrators and assigns, covenants with the said assignees (the plaintiffs), their successors, and assigns that the said mortgagor will well and truly pay all the moneys and interest secured by the said mortgage in the manner therein provided for."

One Edward Mills subsequently became owner of the southerly twenty-five feet (one-half of the mortgaged lot), and one William Wellwood became owner of the northerly twenty-five feet of it. The conveyances to them were made by Mary W. Saunderson, to whom the mortgagor had previously conveyed the whole lot, and the conveyance to Mills is the earlier in point of time. Both conveyances are made subject to the mortgage, which, as each of them states, to the extent of one-half of the mortgage money and interest, forms part of the consideration money for the conveyance.

On January 27th, 1891, the plaintiffs, without obtaining the consent of the defendant Coleman, discharged the south half of the lot from their mortgage, in consideration of the payment of one-half the principal money, and the interest on the one-half of it.

The defendant Coleman defends upon the grounds that in the transaction he was surety for the payment by the mortgagor of the mortgage debt, and that the discharge by the plaintiffs from the mortgage of the south half of the lot constituted such a variation of the contract guaranteed by him that he is discharged from all liability on his covenant.

That the defendant Coleman occupied the position of surety for the performance by the mortgagor of his covenant to pay the mortgage money and interest is not denied by the plaintiffs, but they contend that the effect of the release of the south half of the lot from the mortgage was not to discharge the defendant Coleman or in any way to affect his liability on his covenant.

It is not open to question that any alteration of the contract guaranteed, without the assent of the surety, discharges him absolutely unless it be without inquiry evident that the alteration is unsubstantial.

The only question to be determined, then, is, did the release from the mortgage of the south half of the lot constitute such an alteration of the contract guaranteed? And that must, I think, be answered in the affirmative.

The contract for the performance of which the defendant Coleman became surety, was the covenant of the mortgagor for the payment of the mortgage money and interest which was secured by the mortgage of the whole lot, no part of which he was entitled to have reconveyed until he had paid the whole mortgage debt. The effect of the release of one-half of the lot from the mortgage is to leave in the hands of the mortgagees only one-half of the land as security for the payment of what remains due. That was, in my opinion, an alteration of the contract which the defendant Coleman had guaranteed, and not an unsubstantial one as far as one can judge without inquiry into the value of the respective halves of the lot.

It may be that the security of the mortgagees was not lessened or in any way impaired by what was done, for the amount paid as the consideration for the release may have been the full value of the part which was released, but, according to the decided cases, it is not open to the Court to enter upon an inquiry as to that in order to ascertain whether or not the alteration was a substantial one.

The plaintiffs' case, therefore, in my opinion, fails, and the action must be dismissed, with costs.

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[IN THE COURT OF APPEAL.]

C. A.

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June 29.

## THE BIRKBECK LOAN CO. V. JOHNSTON ET AL.

*Trusts and Trustees—Shares in Building Society—Mortgage of Shares Held “in Trust”—Notice—Purchaser of Land Subject to Mortgage Collateral to Loan on Shares Without Notice that Shares Pledged for Prior Loan—Consolidation—Purchaser of Trust Shares.*

AN appeal by the plaintiffs from the judgment of the Divisional Court in this action, reported 3 O.L.R. 497, was argued before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on February 4th, 1903, and judgment was given on June 29th, 1903, the majority of the Court holding that as the case had been presented on the pleadings, and in the absence of the children of the defendant Amelia Johnston, who were not made parties, there could be no disposition of the case as regarded the C. shares, and that the judgment of the Divisional Court must be amended so far as it dealt with these shares, and so far as it awarded costs to the defendant Frank Johnston, and referred to lands as included in the transfer of July 20th, 1897; and that with these modifications, the appeal should be dismissed with costs, but without prejudice to any rights the plaintiffs might claim to have against the six C. shares for moneys properly advanced for the benefit of the parties beneficially entitled thereto.

*A. B. Aylesworth*, K.C., and *T. H. Luscombe*, for the plaintiffs.

*P. H. Bartlett*, and *J. F. Faulds*, for the defendant Anna K Johnston.

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[MEREDITH, C.J.C.P.]

## CROSSETT v. HAYCOCK.

1903

July 27.

*Dower—Bar of Dower—Infant Wife—Purchaser for Value—R.S.O. 1897, ch. 165, sec. 5.*

An infant wife joined to bar dower in a deed from her husband to a purchaser for value, but after the former's death nevertheless brought this action for dower :—

*Held*, that by sec. 5 of the Married Woman's Real Estate Act, R.S.O. 1897, ch. 165, the infancy of the plaintiff was immaterial, and her right was barred.

A father conveyed land to his son in pursuance of a preceding agreement between them that he would do so if the son would work the land with him for the next ensuing season :—

*Held*, that the son was a purchaser for value within the meaning of the above section.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at Woodstock, on June 16th, 1903. The nature of the action and the facts proved in evidence are stated in the judgment.

*W. R. Riddell*, K.C., and *R. V. Sinclair* for the plaintiff, referred to *Smith v. Smith* (1897), 29 O.R. 309; *Reekham v. Depotty* (1890), 17 A.R. 273; *re George Shunk Estate* (1899), 31 O.R. 175.

*G. F. Mahon* for the defendant, referred to *Patrick v. Shaver* (1874), 21 Gr. 123; *Rody v. Rody* (1881), 29 Gr. 324; *Leys v. Toronto General Trusts Co.* (1892), 22 O.R., 603; *Reynolds v. Torin* (1826), 1 Russ. 129; R.S.O., 1897, ch. 165, sec. 5.

July 27. MEREDITH, C.J.C.P.:—This is an action to recover dower in certain lands, of which the deceased husband of the plaintiff was the owner in fee simple during the existence of the marriage, and which he, after his marriage with the plaintiff, conveyed to the defendant by deed bearing date May 4th, 1895, for the expressed consideration of \$3200.

The plaintiff joined in the deed and thereby barred her dower in the lands, but she was an infant, and she now contends that the bar of dower is therefore not binding upon her. She also alleges that she executed the deed not knowing the contents of it or understanding or having explained to her the

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effect of what she did, but I found against this latter contention at the close of the argument.

The defendant meets the defence of infancy by alleging that he was a purchaser for value of the lands, and, therefore, according to the provisions of The Married Womans Real Estate Act, R.S.O., 1897, cap. 165, sec. 5 \* the infancy of the plaintiff when she barred her dower is of no consequence; and he also contends that, by the will of her deceased husband, the plaintiff was put to her election between her dower and the provisions of the will in her favour, and that she has elected to take under the will.

Upon the argument I was inclined to think that the defendant had not made out that he was a purchaser for value, but further consideration has led me to the conclusion that he was.

The amount of the consideration is, I think, as Mr. Mahon argued, immaterial; all that is necessary to be shewn is that it was a valuable one.

The facts, as I find them on the evidence, are that the defendant was the son of the plaintiff's husband, who owned the lands in question, and an adjoining farm. His wife—the one who preceded the plaintiff—had just died; the father was desirous that the defendant should remain at home with him, and, in order to induce him to do so, promised that, if he remained at home, he would make him a deed of the lands in question; and it was finally arranged, in March of 1895, that they should work the land together for the following season, and that the father should then convey the land to the defendant, and it was in pursuance of this agreement, which was fully performed on the defendant's part, that the deed of May 4th, 1895, was executed.

This is sufficient, I think, to make the defendant a purchaser for value within the meaning of the statute.

\*R.S.O., 1897, ch. 165, sec. 5: Any married woman, under 21 years of age, of sound mind, might on and since May 5th, 1894, and hereafter may bar her dower in any land or hereditaments by joining with her husband in a deed or conveyance thereof to a purchaser for value, or to a mortgagee, in which deed or conveyance a release or bar of her dower is contained, and she may in like manner release her dower to any person to whom such lands or hereditaments have been previously conveyed.

The many cases in which the plaintiffs have failed in establishing, to the satisfaction of the Court, the existence of a bargain with a father or other relative to convey land to them in consideration of services to be performed, or changes in position, from what the Court has held to be only expressions of intention, were relied on by the plaintiff; but this case differs from them. It is always in such cases a question of fact as to whether there was a bargain or not. In this case, the fact that the deed was given, and that it is expressed to be made for a valuable consideration, tend, I think, to support the view that there was a bargain to convey the land, and not a mere expression of intention to do so, which might be carried out or not as the father saw fit, and it is perhaps less difficult to come to that conclusion than it would have been if the transaction had not been an executed one.

Having come to the conclusion that the defendant was a purchaser for value, it is not necessary to consider the other question raised by him.

The action, in my opinion, fails, and must be dismissed, with costs.

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## [DIVISIONAL COURT.]

D. C.

1903

June 29.

## STEWART V. GUIBORD ET AL.

*Foreign Judgment—Action on—Declaratory Judgment—Simple Contract Creditor—Preliminary Relief—Statute of Limitations—R.S.O. 1897, vol. III., ch. 324, sec. 40.*

A creditor under a Quebec judgment asked a declaration that the judgment debtor was beneficial owner of a certain claim against the Dominion Government :—

*Held*, that being in this Province in the position of a simple contract creditor only, he was not entitled to such preliminary relief, for the same reasons which debar a simple contract creditor from taking garnishee proceedings or proceedings for equitable execution ; and also because the claim being one against the government no consequential relief was or could be asked.

*Held*, also, that being more than six years old, the judgment, being in this Province merely a simple contract debt, would under ordinary circumstances have become barred, yet since the judgment debtor was not at the time of their recovery, nor had been since, in this Province, the plaintiff's remedy on it was saved by R.S.O. 1897, vol. III., ch. 324, sec. 40.

The facts in this case may be shortly stated as follows :—The plaintiff had a claim against the Government of Canada for some \$1,500, and was indebted to the defendant Lallemand in a considerable sum. Lallemand was in financial difficulties and assigned to the defendant Guibord his claim against the plaintiff. Guibord brought an action in the Province of Quebec against Stewart upon this claim, whereupon the Montreal Rolling Mills Company having a judgment in the Province of Quebec against Lallemand, intervened and sought to seize the debt against Stewart, alleging that it was in fact the property of their debtor Lallemand, and was held by Guibord only as trustee for him. The Montreal Rolling Mills Company, however, finding themselves unable to prove their case, withdrew their intervention ; then Stewart settled the action by assigning to Guibord his claim against the Government, and Guibord released him from the debt. Afterwards Stewart purchased from the Montreal Rolling Mills Company their judgment in the Province of Quebec against Lallemand and brought the present action. He asks for judgment in this Province against Lallemand upon the Quebec judgment of which he is assignee, and he asks for a declaration, binding upon the defendants, that Guibord holds the transfer of the claim against the



Government merely as trustee for Lallemand, and that Lallemand is really the true beneficial owner of it, the object being to enable the plaintiff Stewart to obtain the money from the Government in some other proceedings or to have the amount due from the Government applied by some other proceedings in settlement *pro tanto* of his claim as assignee of the Montreal Rolling Mills Company against Lallemand.

The action was referred for trial to the local Master at Ottawa, who found in favour of the plaintiff, and the defendants appealed to the Chief Justice of the Common Pleas who reversed the decision of the local Master so far as the plaintiff's claim against Guibord was concerned, dismissing the action with costs as against him, and ordering judgment to be entered against Lallemand for the amount of the plaintiff's claim as assignee of the Montreal Rolling Mills Company's judgment. The judgment of the learned Chief Justice is reported in 2 O.W.R. 168.

From this judgment the plaintiff appealed to the Divisional Court, and the defendant Lallemand also appealed upon the ground that the remedy against him in this Province was barred by the Statute of Limitations, and the appeals were argued on June 4th, 1903, before STREET and BRITTON, JJ.

*Glyn Osler*, for the plaintiff, contended that the Court had jurisdiction to make and should make the declaration asked, and so satisfy the Government as to the rights of the parties: Ontario Judicature Act, s. 57, sub-s. 5; Annual Practice, 1903, p. 315; Holmested and Langton's Judicature Act, p. 53; *Pride v. Rodger* (1896), 27 O.R. 320.

*W. E. Middleton*, for the defendants, contended that the Court should not make a declaratory judgment in this case: *Bunnell v. Gordon* (1891), 20 O.R. 281; *City of Kingston v. Kingston, Portsmouth & Cataraqui Electric R.W. Co.* (1897), 28 O.R. 399; *Honour v. Equitable Life Assurance Society of the United States*, [1900] 1 Ch. 852; *Barracrough v. Brown*, [1897] A.C. 615; *Cosgrove v. Corbett* (1868), 14 Gr. 617, 16 Gr. 467; that the plaintiff having no judgment in Ontario against Lallemand, was only in the position of a simple contract

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creditor: *Thompson v. Cushing et al.* (1898), 30 O.R. 123; that the remedy on the Quebec judgment was barred by lapse of time; that the fact that Lallemand was a foreigner who had never been within Ontario, distinguished this case from *Bolton v. Langmuir* (1897), 24 A.R. 618, and *Bugbee v. Clergue* (1900), 27 A.R. 96.

*Osler*, in reply, contended that until a foreign judgment debtor comes within the jurisdiction or renders himself liable to be served out of the jurisdiction, no statute of limitation applies.

June 29. The judgment of the Court was delivered by STREET, J. [after first stating the facts as above]:—The facts of this case may for the purposes of our decision be reduced to the following simple form:

Stewart has a simple contract debt against Lallemand; Guibord holds a claim against the Government; Stewart brings this action against Lallemand and Guibord, asking for judgment against Lallemand upon his simple contract debt, and for a declaration against both defendants that Lallemand and not Guibord is beneficial owner of the claim against the Government.

In my opinion he is not entitled to such a declaration because at the time he began this action he was not a judgment creditor of Lallemand: *Thompson v. Cushing*, 30 O.R. 123, 338.

It is clear, if the debt were due by a private individual to Lallemand instead of from the Canadian Government, that the plaintiff could not garnish it without first obtaining a judgment, nor could he, supposing it to be a claim not subject to the garnishee rules, obtain equitable execution without first recovering a judgment; and the reasons which prevent the owner of a mere simple contract debt not reduced to judgment from taking garnishee proceedings or proceedings for equitable execution, prevent his having any *locus standi* to obtain the preliminary relief of a declaration that the debt which he desires to seize is due to his debtor.

Furthermore, I am of opinion that this is not a case in which the power to make a declaratory judgment merely could

be properly exercised. No consequential relief is asked, nor is it suggested that any is within our power. The reason given by the plaintiff to induce us to make the declaration asked for is that the production of a judgment containing such a declaration will enable him to satisfy the Government that he and not Guibord is entitled to receive the money in question; but we could not follow up the proposed declaration by any further order or judgment for the payment by the Government to him of the money which he is seeking to obtain. This being the case, the authorities seem clearly against the right of the plaintiff to obtain a mere declaration: *Barraclough v. Brown*, [1897] A.C. 615; *Grand Junction Waterworks Co. v. Hampton Urban District Council*, [1898] 2 Ch. 331. The appeal of the plaintiff from the judgment of the Chief Justice should therefore, in my opinion, be dismissed with costs.

The defendant Lallemand has also appealed from the judgment in favour of the plaintiff against him upon the Montreal Rolling Mills Company judgment upon the ground that the Chief Justice should have held the claim to have been barred by the Statute of Limitations.

The judgment in the Province of Quebec was recovered on Oct. 10th, 1893, and the present action was begun on May 29th, 1902. By the law of Quebec the judgment recovered in that Province could be enforced at any time within 20 years; in this Province, being merely a simple contract debt, the remedy upon it would under ordinary circumstances be barred at the end of six years from the time it became due, that is to say from the date of the recovery of the Quebec judgment. It appears, however, that at the time of the recovery of the judgment Lallemand was domiciled and resident in the Province of Quebec, and that he has not been in this Province at any time since then.

Under these circumstances I think the plaintiff's remedy is saved by R.S.O. 1897, Vol. III., ch. 324, sec. 40\*, and the debt

If a person against whom any such cause of action as aforesaid accrued is, at such time, out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited, after the return of the absent person to Ontario.

\* Cf. R.S.O. 1897, Vol. I., ch. 72, sec. 5.

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was not barred : *Forbes v. Smith* (1855), 11 Ex. 161 ; *Bolton v. Langmuir*, 24 A.R. 618 ; *Bugbee v. Clergue*, 27 A.R. 96.

The appeal of the defendant Lallemand from the judgment of the Chief Justice should therefore also be dismissed with costs.

A. H. F. L.

[FALCONBRIDGE, C.J.K.B.]

1903

IDINGTON v. DOUGLAS.

Sept. 1.

*Landlord and Tenant—Expiry of Lease—Continuation of Possession b Tenant—Special Agreement—Tenancy at Will.*

Although payment of rent in aliquot proportions of a year is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year, yet such payment does not create the tenancy, but is only evidence from which the Court or jury may find the fact :—

*Held*, therefore, in this case where the landlord, before he accepted any rent after expiry of a lease, told the tenants that he would not consent to any tenancy from year to year, but that they should remain as they were on expiry of the lease, to which they assented, that the parties were not tenants from year to year, but tenants at will, although rent continued to be paid as under the lease.

Tenants who, on expiry of lease, are permitted to continue in possession pending a treaty for a further lease, are not tenants from year to year, but tenants at will.

THIS was an action for recovery of land tried before FALCONBRIDGE, C.J.K.B., without a jury, at Stratford, on June 16th and 17th, 1903. The facts as shewn by the evidence are sufficiently stated in the judgment.

*R. S. Robertson*, for the plaintiff, contended that the evidence shewed a tenancy at will from the expiration of the old lease until put an end to, and that payment of rent was only one circumstance by which to ascertain the intention of the parties : *Doe dem. Hull v. Wood* (1845), 14 M. & W. 682 ; *Doe dem. Lord v. Crago* (1848), 6 C.B. 90 ; *Morton v. Woods* (1869), L.R. 4 Q.B. 293, 306 ; *Lennox v. Westney* (1889), 17 O.R. 472 ; Woodfall on Landlord and Tenant, 14th ed., pp. 236-7 ; that a tenant holding over pending negotiations for a new lease is only a tenant at will : *Smith v. Widlake* (1877), 3 C.P.D. 10, 15 ; *Doe dem. Brune v. Prideaux* (1808), 10 Exch. 158.



*J. P. Mabee*, K.C., and *G. G. McPherson*, K.C., for the defendants, contended that a yearly tenancy was shewn.

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*Robertson*, in reply.

September 1. FALCONBRIDGE, C.J.: In my opinion the uncontradicted facts establish a tenancy at will since the expiry of the written lease.

The reservation or payment of rent in aliquot proportions of a year is no doubt the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shewn to repel the implication: *Woodfall on Landlord and Tenant*, 17th ed., p. 246.

Now the plaintiff swears that before he accepted any rent after the expiry of the lease he explained to Thornton (one of the lessees and partner of Douglas), now deceased, that he (plaintiff) would not consent to any tenancy from year to year so as to require any notice to be given, and that they should remain in the same position as they were, or would be, on expiry of the lease. The parties were contemplating a further term, and plaintiff says Thornton, who wanted a new lease, did not demur to this arrangement, and finally assented to it.

And again he says that about a year after the expiry he again told Thornton he saw nothing for it but to continue under the same arrangement.

The rent was to be the same as that reserved by the lease, and it was to go on in every way subject to the above limitation.

Douglas, who was not present at these conversations, naturally cannot deny them, but his account of what Thornton reported to him does not contradict, but rather corroborates, the plaintiff's statement. He says that Thornton reported that the plaintiff asked to have the matter stand over while he was dealing with Ferguson (an adjoining tenant), and that the plaintiff wanted to have the leases running concurrently. In the meantime they were to go on as they were. It was drifting at Idington's request.

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Thornton died on March 25th, 1902, and thenceforward the plaintiff in his letters always repudiates any idea of a yearly tenancy.

I do not think the plaintiff's statement requires corroboration under R.S.O. (1897), ch. 73, sec. 10, but if it should, I think there is corroboration.

But apart from the express agreement which plaintiff sets up, the defendants are in the position of tenants whose lease has expired and who are permitted to continue in possession pending a treaty for a further lease, and so they are not tenants from year to year, but strictly tenants at will: Woodfall on Landlord and Tenant, 17th ed., p. 253.

That tenancy was determined by demand of possession before action brought.

The ineffectual notice to quit given by the plaintiff on September 15th, 1902, was no doubt served *ab abundanti cautelâ*, and furnishes no sound argument against the plaintiff's position.

I have been dealing with the matter as though the defendants were the original lessees. Many matters relating to assignments of the terms, and alleged forfeiture thereof, were debated, but they are not, having regard to the above findings, now material.

And plaintiff expressed himself to be content with the judgment for possession, and, in that event, waived his claims for alleged nuisance and under the Factories' Act.

There will be judgment for possession after 30 days, with mesne profits, based on the amount hitherto paid, since February 1st, and the proportion of the year's taxes. These amounts can be settled by the parties before the local registrar at Stratford.

A. H. F. L.

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[OSLER, J. A.]

## GARDNER V. PERRY.

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July 22.

*Trusts and Trustees—Misappropriation by Co-executor—Negligence—Delay—Trustee Act, R.S.O. 1897, ch. 129, sec. 32 (1) (b).*

Plaintiff's testator died in 1870, having by his will given the income of his estate to his widow for life and, subject to certain bequests, the residue to the children of his brothers and sisters, and appointed two executors and the widow executrix of his will. One of the executors managed the estate until the time of his death in 1885, by which date some of the real estate had been disposed of and the proceeds invested, and his management was duly accounted for. The surviving executor then managed the estate until 1895, when the widow took proceedings against him for an account, the result of which was he was found largely indebted and unable to pay the amount. The widow died in 1902, probate of her will was then granted to the defendants, and the surviving executor of the testator was removed as trustee and the plaintiffs appointed in his place.

In an action by the plaintiffs against the defendants in 1903 to compel them to make good the losses to the estate of their testator occasioned by the negligence of the widow executrix in permitting her co-executor to misappropriate the funds of the estate:—

*Held*, that, whatever might be the rights of those entitled in remainder, as all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, section 32 (1) (b) of the Trustee Act, R.S.O. 1897, ch. 129, was a good defence to an action by the trustees.

*In re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444, commented on and followed.

THIS was an action by the newly appointed trustees of the estate of one Robert Gardner, deceased, against the representatives of Marietta Gardner, an executrix, named in his will, to compel them to make good losses occasioned, as alleged, by her negligence in permitting one Thomas Holtby, a co-executor and trustee, to misappropriate large sums of money belonging to the estate.

The action was tried at Brampton on the 16th of April, 1903, before OSLER, J. A., without a jury.

*E. E. A. DuVernet* and *R. E. Heggie*, for the plaintiffs.  
*Shepley*, K.C., and *E. G. Graham*, for the defendants.

July 22. OSLER, J. A. :—At the trial before me at Brampton it appeared that Robert Gardner, the testator, a wealthy farmer, died in November, 1870, leaving a will, probate of

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which was granted on the 22nd December, 1870, to the executors and executrix therein named, viz.: Thomas Holtby; the testator's brother, Joseph Gardner, and his widow, Marietta Gardner, the defendant's testatrix.

By his will the testator gave the income of his estate to the widow for her life and, subject to certain legacies and bequests, devised the residue to be equally divided at her death between the children of his brothers and sisters.

The executors and executrix were "to carry this my last will into effect"—and power was conferred upon them "to dispose of the property if they think proper."

Joseph Gardner, apparently with the consent of his co-executors, assumed and retained the management and administration of the estate up to the time of his death in December, 1885, by which date some of the real property had been disposed of and the proceeds invested.

After this the whole management fell to the executor Thomas Holtby, a person who was then of good business credit and reputation and an intimate and trusted friend of the widow in matters social, financial and religious.

She was then about seventy five years of age and, though described as a person of more than ordinary strength of character and mental qualities, was entirely unaccustomed to business, and left to Holtby not only the sole administration of the trust estate, but also entrusted to him, or left in his hands, the management of the income derivable by her therefrom and of her financial affairs generally.

The accounts of Joseph Gardner's dealings with the estate were taken in an action brought in 1892 against his representatives by the surviving executor and executrix of Robert Gardner; and all moneys and assets belonging to the estate of the latter were duly transferred to them.

In the latter part of the year 1894 the friends of Mrs. Gardner became anxious about Holtby's dealings with the estate and with her own property and tried to get her to bring him to account therefor. For a long time she resisted all attempts of this kind, but was finally induced, in November, 1895, to permit her name to be used in an action brought for that purpose.



The result of the proceedings in that action was that Holtby was charged with a balance of \$4,173.27 of principal moneys belonging to the estate in his hands at the date of the Master's report of the 27th June, 1896, which sum with interest from that date he was ordered to pay over to the receiver in the action.

The plaintiff Marietta Gardner's costs, taxed at \$469.10, were ordered to be paid to her out of the estate, "reserving to the residuary legatees leave to recover back the same, if so entitled, by way of damages from the plaintiff for alleged breach or wrong-doing in respect of the estate, should it be established in any action to be brought by them against the plaintiff for that purpose."

On the judgment so recovered against Holtby no more than the sum of \$203.57 was realized and the rest remains, and is likely to remain, unpaid, as also does his defalcation in respect of the widow's own estate, amounting to upwards of \$2,200.

Mrs. Gardner died at the age of ninety two in January, 1902. Probate of her will was granted to the defendants, the executors therein named, and by an order of the 10th March, 1902, made upon an application under Rule 938, and on the consent of Holtby, the surviving executor, he was removed from his executorship and the now plaintiffs, F. A. Gardner and Wesley Reid Wright, were appointed trustees of the last will and testament and of the estate of the said Robert Gardner, deceased, which estate was thereby vested in them as such trustees, etc.

The new trustees brought this action on the 31st May, 1903. All the alleged acts of negligence or breaches of trust charged against Mrs. Gardner, including her delay after notice in taking proceedings against her co-trustee, Holtby, occurred more than six years before action, and her representatives plead sec. 32 (1) (b) of the Trustee Act, R.S.O. 1897, ch. 129, as making the lapse of that time a bar to an action at the suit of the trustees of Robert Gardner.

They also plead the provisions of the Trustee Relief Act, 1899, 62 Vict. (2nd sess.), ch. 15, sec. 1 (O.).

The last ground of defence is one into the consideration of which I do not find it necessary to enter; partly because of the

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view I take of the first, as constituting a defence to the action; and partly because of the somewhat uncertain and indefinite way in which the evidence has been presented with regard to the actual breaches of trust, and the particular sums in respect of which it is sought to make the estate of Mrs. Gardner responsible, all of which in an action constituted at the suit of the beneficiaries, whom I regard as the proper parties to sue, may be more fully brought out.

The present action is brought by the new trustees of the Robert Gardner estate against the representatives—those claiming under—of one of the former trustees and the case of *In re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444, appears to me a clear decision that upon the facts I have set forth, sec. 32, sub-sec. (1) (b), of the Trustee Act operates as a bar to the demand and a defence to the action.

The opinion expressed by Fry, J., in that case as to the meaning of sub-sec. 1 (a) of the corresponding section of the Imperial Act of 1888 is criticized and *semble* dissented from by the Court of Appeal in *How v. Earl Winterton*, [1896] 2 Ch. 626, but this leaves the application of sub-sec. 1 (b) to such a case as the present untouched.

The case is not brought within any of the exceptions in sub-sec. (1) of sec. 32 and the result is that, although the beneficiaries under the will, whose interests became interests in possession on the death of Mrs. Gardner, the tenant for life, may not be barred; an action at the suit of the trustees, whose duties, so far as I am able to perceive, came to an end at her death, is so.

The case of *In re Cross, Harston v. Tenison* (1882), 20 Ch. D. 109, to which I have been referred, was decided before the Act of 1888, and is for that and other reasons not applicable.

Lewin on Trusts, 10 ed. pp. 1084, 1085 and 1086, and *In re Swain, Swain v. Bringeman*, [1891] 3 Ch. 233, may be referred to.

G. A. B.

## [IN THE COURT OF APPEAL.]

## RE NORTH GREY ELECTION.

## BOYD V. MACKEY.

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March 16.

*Parliament—Practice—Presentation of Petition—Copy for Returning Officer—Omission—Default Under Rule 1 (2)—Extension of Time—Rule 58.*

Election petitions filed with local registrars under 62 Vict. (2nd sess.) ch. 6 (O.) are received by them as registrars of the Court of Appeal.

Although a petitioner who does not leave with the local registrar a copy of the petition at the time of filing the petition to be sent to the returning officer is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And where through inadvertence the solicitor for a petitioner had omitted to leave the copy and applied without delay, the time was extended, and an order for the dismissal of the petition was discharged.

Judgment of MacLennan, J.A., reversed.

This was an appeal from two orders of MACLENNAN, J.A., made in Chambers, one of which directed that the petition filed on behalf of the petitioner in the office of the local registrar at Owen Sound should be dismissed, and all further proceedings thereunder stayed; and the other dismissed an application on behalf of the petitioner to extend the time for leaving a copy of the petition with the local registrar at Owen Sound to be sent to the returning officer.

The motions for the orders were argued in Chambers on the 14th day of March, 1903, before MACLENNAN, J.A.

*Hellmuth*, K.C., and *Eric Armour*, for petitioners.

*R. A. Grant*, for respondent.

March 16. MACLENNAN, J.A.:—A petition against the return of the respondent was filed with the local registrar of the High Court at Owen Sound, in pursuance of the Controverted Elections Act, sec. 10, as amended by 62 Vict. (2nd sess.) ch. 6, on the 9th February, the last day allowed for doing so, and was served on the respondent on the 14th of February.

No copy of the petition was left, either with the local registrar, or with the registrar of the Court of Appeal, to be sent to

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the returning officer, as required by Rule 1 (2) nor did the local registrar send a copy of the petition to the returning officer as directed by section 12 (1) of the Act as amended by 62 Vict. (2nd sess.) ch. 6, sec. 3.

The consequence was that no notice of the filing of the petition was advertised by the returning officer. This omission was not discovered by the respondent until Saturday, the 28th of February.

On Monday, the 2nd of March, the respondent served a notice of motion to take the petition off the files, and to stay proceedings on account of the irregularity.

Upon this the petitioner left a copy of the petition with the local registrar on the 4th of March, and the proper advertisement was published by the returning officer on the 6th of March.

On the 5th of March the petitioner served a notice of motion for an order to extend the time for leaving the copy of the petition with the local registrar, or to allow the copy which had been left on the preceding day, as a sufficient compliance with the statute and rules.

Mr. Grant relied upon two decisions of the Supreme Court of Canada, the *Lisgar* case from Manitoba (1891), 20 S.C.R. 1, and the *Burrard* case from British Columbia (1901), 31 S.C.R. 459, in which the omission to leave a copy of the petition with the officer, at the same time as the filing of the petition, was held to be fatal.

In the first case no copy had been left at any time, and in the latter case a copy had been left two or three days after the petition, but after the time for presenting the petition had elapsed. In the first case the Court was divided, two of the Judges being of the opinion that the omission might have been remedied; and in the latter case, while the same Judges retained the opinion originally expressed, a majority of the Court felt bound by the former decision.

Mr. Hellmuth contended that, having regard to the amendments of the Act by 62 Vict. (2nd sess.) ch. 6, and no corresponding amendments having been made of the Rule 1, sub-sec. 2, there was no express obligation on the petitioner to leave a copy with the local registrar: the rule, as it stands, only directing



that with the petition shall also be left a copy thereof for the said registrar of the Court of Appeal to send to the returning officer, pursuant to sec. 12 of the said Act.

I am against this argument. Reading the rule, and having regard to the amendments, I think the obligation to leave the copy with the local registrar along with the petition is clear.

The Court having jurisdiction in Provincial elections is the Court of Appeal, and the effect of the amendments of the Controverted Elections Act is to make the local registrar of the High Court, so far as election petitions are concerned, local registrars of the Court of Appeal, and when the rule directs, that, with the petition there shall be left with the said registrar a copy, etc., that must be held to mean the same officer with whom the petition is to be filed, although the words "of the Court of Appeal" are added to the word "registrar."

But even if the Rule 1, sub-sec. 2, could not be held to apply so as in terms to require a copy, as well as the petition itself, to be left with the local registrar, it would still be clearly obligatory to do so by reason of sec. 113 of the Act. That section declares that "so far as the rules from time to time in force do not extend, the principles, practice and rules on which election petitions touching the election of members to the House of Commons of England were on the 15th day of February, 1871, dealt with, shall, where not inconsistent with this Act, be observed." The English rule of that date applicable to the present question was this: "With the petition shall also be left a copy thereof for the Master to send to the returning officer, pursuant to sec. 7 of the Act," and the "Master" was the officer with whom the petition was directed to be filed: *Hardcastle on Election Petitions*, 3rd ed., p. 19.

In the *Lisgar* and *Burrard* cases there were no rules, and the leaving of the copy was held to be necessary, by virtue of the English rule, under a section of the Controverted Elections Act of the Dominion almost identical in terms with sec. 113. I therefore think that, either under our own rules or under the English rule, it was obligatory upon the petitioner to have left a copy along with the petition with the local registrar at Owen Sound, on the day on which the petition was filed.

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Mr. Hellmuth also invoked the aid of rule 58, which authorizes the Court or a Judge to extend the time appointed for doing any act, or taking any proceeding, either before or after the time has elapsed. This rule is substantially the same as rule 353 of the Supreme Court of Judicature. There was no corresponding rule in England on the 26th May, 1874, the time referred to in the Dominion Controverted Elections Act, under which the *Lisgar* and *Burrard* cases were decided. The rule then in force, Rule 60, was that no proceeding should be defeated by any formal objection.

There is no appeal from this Court to the Supreme Court of Canada in Provincial election cases, and so I am, in strictness, not bound by the decisions in the *Lisgar* and *Burrard* cases; nevertheless, those decisions must be regarded with the greatest possible respect; and I should need to feel very clear indeed that those cases were wrongly decided before I should differ from them. After very careful consideration, I feel bound to agree with the reasoning of Ritchie, C.J., and Patterson, J. in the *Burrard* case. The Chief Justice regarded the leaving of the copy as by no means a mere formal proceeding, but an essential part of the presentation or filing of the petition, and that without the copy being left, there was no proper or due presentation, or filing, of the petition. Patterson, J., said, at p. 10: "Two things are to be done together, as directed by Rule 1. One is the presentation of the petition by delivering it to the officer, and the other is the leaving with the same officer the copy for him to send to the returning officer. If the former act were omitted, no one would contend that the omission was not fatal notwithstanding that a copy and notices had been served on the respondent, or contend that it could be cured by delivering the petition *nunc pro tunc*. The second requirement of the rule may seem less fundamental than the first, but it is something prescribed to be done by the petitioner at the institution of the proceedings, and it is not easy to find safe ground for holding one requirement to be less imperative than the other. We must hold the petitioner to the duty cast upon him by the law, without speculating, as we have been invited to do, on the comparative importance to him or to the respondent

of his doing what the rule directs, in order that the petition may be promptly published by the returning officer."

I agree with, and adopt the reasoning of these learned Judges; and but for Rule 58 there would be nothing more to be said; the omission must be held to be fatal.

The question, then, is, whether Rule 58 helps the petitioner out of his difficulty.

I incline to think the new Rule 58 is wider than the old Rule 60, which was also a rule of our Court, No. 50, until 1894; and that relief could be given under it, in cases where it could not be done under the old rule. Nevertheless, I do not see how it can be done in this case. The requirement which has been neglected is one of great importance, as pointed out by the judgments already quoted, and, unless one could extend the time for filing the petition, I do not see how we could do so for the leaving of the copy, which should be done at the same time. The Act allows 21 days to file the petition, and I suppose no one would contend that the time limited for that purpose could be extended under the new rule any more than under the old. Then what the rule says is, that *with* the petition shall also be left a copy. How can that be complied with, by leaving it, not *with the petition*, but at some other time. I do not see how it could.

But there is a further reason which, in my opinion, is fatal to the petitioner's application. It is clear that on applications under Rule 58 some good and sufficient reason or ground must be shewn for granting the indulgence. I do not think that has been shewn in this case. The application is supported only by the affidavit of a solicitor of Owen Sound. He does not say that he is or was the petitioner's solicitor. What he says is: "I am the solicitor at Owen Sound who filed the petition herein on behalf of the petitioner, George M. Boyd." Though that is vague, I think it must be taken, that he is and was the petitioner's solicitor, for whose acts and neglects the petitioner is responsible. The affidavit goes on to say, that the original petition duly sworn and copies reached his hands, through a messenger from Mr. Boyd, the petitioner, on Monday, the 9th of February; that he had no copy of the orders of the Court of Appeal respecting election petitions, but only the Act itself; and

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he complied to the best of his knowledge and belief with sec. 10 of the Act, and filed the original petition with the local registrar. He adds that he was not aware of the provisions of the rule requiring a copy to be left; and if the rule requires it, the omission was through inadvertence and mistake.

A Judge always feels disposed to relieve against the consequences of inadvertence and mistake, when that can be done without injustice; but this is not a case of that kind. It is a case of pure ignorance, caused by not providing himself with a copy of the rules, which he was bound to do. He had in his hand not merely the original petition, signed and sworn by his client, but *copies* also, as he admits. If he had been provided with a copy of the rules, a glance at No. 1 would have shewn him the duty of leaving a copy as well as the original with the officer for an important purpose. He says he studied the Act; and if he had been possessed of a copy of the rules it would not have required much study of them to have enabled him to see what he should have done. He would have seen very plainly, that a copy must have been left *with the petition*, and the statute having substituted the local registrar for the registrar as the officer with whom the petition must be filed, he would have seen that the copies must also be left with him. As it was, and even without having a copy of the rules, it is difficult to understand why he did not leave a copy with the local registrar to enable him to comply with sec. 12. He could hardly expect the officer himself to make a copy of a long printed petition in order to send it to the returning officer as directed by sec. 12.

I think the petitioner has not shewn any sufficient ground or reason for an extension of time, even if the rule could be held applicable to this particular omission. The only excuse is, the want of the rules, and consequent ignorance of what ought to have been done; and I think ignorance alone is not sufficient to excuse an omission in compliance with an important requirement of the statute for upwards of three weeks. I think the respondent's motion must be granted, and the petitioner's motion must be refused, and both with costs.

From this judgment the petitioner appealed, and the appeal was argued on the 27th May, 1903, before MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., and STREET, J.



*Hellmuth*, K.C., for the appeal. There is no want of compliance with the statute: if there is any it is with the rules. Sec. 10 of "The Ontario Controverted Elections Act," R.S.O. 1897, ch. 11 provides for the presentation of a petition by leaving it with the registrar of the Court or otherwise dealing with it "in manner prescribed." Rule 1 prescribed that a copy should be left with the registrar to send to the returning officer. The "registrar" is defined to be the registrar of the Court of Appeal. That section has now been altered by 62 Vict. (2nd sess.) ch. 6 (O.), directing certain petitions to be delivered to local registrars, or dealing with them "in manner prescribed." No new rule prescribing how such petitions were to be dealt with was passed, so there is no direction to leave a copy with a local registrar for the returning officer. Filing the petition is sufficient, and if a copy is necessary he can furnish it. All the formalities required by the Act have been complied with. Even if there was default, the Court should treat the rule as a mere direction, and give relief unless the default goes to the root of the whole matter: *Rules 58 and 60 Newcombe v. McLuhan* (1886), 11 P.R. 461: *D'Ivry v. World Newspaper Co.* (1897), 17 P.R. 543. The *Burrard* and *Lisgar* cases in the Supreme Court 31 S.C.R. 459 and 20 S.C.R. 1 respectively, are not binding upon this Court, which is a final appellate Court in Ontario election appeals, and the opinions of the dissenting Judges in the above, it is submitted, express the correct view of the law: but, in any event, there is a marked distinction between the Dominion Act and Rules and the Ontario Act and Rules.

*R. A. Grant*, contra. There is no distinction between the Act and the Rules. When the Act was amended, the local registrars, for the purposes of the Act, became registrars of the Court of Appeal. The leaving of a copy for the returning officer was a part of the presentation of the petition. The *Lisgar* case, 20 S.C.R. 1, *per* Patterson, J., at p. 10. The subsequent leaving of a copy was not sufficient to correct the defect: The *Burrard* election case, 31 S.C.R. 459. If the

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objection is fatal it cannot be cured. No case for relief is made out, and the discretion exercised will not be interfered with.

*Hellmuth*, in reply.

June 29. Moss, C.J.O. :—This is an appeal from two orders pronounced by my brother Maclellan, in Chambers, the first of which directs that the petition filed on behalf of the petitioner in the office of the local registrar at Owen Sound be dismissed, and all further proceedings thereunder stayed; and the second dismisses an application on behalf of the petitioner to extend the time for leaving a copy of the petition with the local registrar at Owen Sound to be sent to the returning officer.

The questions to be determined are: first, whether by the terms of the Controverted Elections Act, as amended by 62 Vict., (2nd sess.) ch. 6 (O.), or of the general rules and orders respecting the trial of election petitions, or by the conjoint effect of the Acts and rules, the petitioner was bound, when delivering the petition to the local registrar, to leave with him a copy thereof to be sent to the returning officer, in order that the latter might forthwith publish a notice thereof pursuant to sec. 12 of the Act: secondly, if he was, whether the time for doing so can be extended; and, thirdly, if so, whether this was a proper case for allowing the extension.

With regard to the first question. Before the amendments introduced by the 62 Vict., (2nd sess.) ch. 6 (O.), the procedure was clearly defined. Sec. 12 of the Act was, and is, silent as to the person upon whom lay the duty of furnishing a copy to be sent to the returning officer. But Rule No. 1, cl. 2, made it the duty of the petitioner. It provided that with the petition, which was to be delivered to the registrar by the petitioner, was also to be left a copy thereof for the registrar to send to the returning officer.

The Act was amended by the 62 Vict., (2nd sess.) ch. 6 (O.), and it was enacted that in cases arising elsewhere than in the county of York, or city of Toronto, presentation of the petition shall be made by delivering it to the local registrar of the High Court of the county in which the electoral district, or any

part thereof, is situated, or otherwise dealing with the same in the manner prescribed.

Following this it was provided, that on presentation of the petition the registrar of the Court of Appeal, or the local registrar of the High Court, as the case may be, shall send a copy thereof by mail to the returning officer of the electoral district to which the petition relates, thus making it the duty of the local registrar to whom a petition was delivered to send a copy to the returning officer for publication of a notice thereof.

Owing to some questions having arisen in consequence of there being no local registrars in some counties, and of there being no express provision for the case of an electoral district situate, or partly situate, in a provisional judicial district, rules were passed to meet these cases, but cl. 2 of Rule No. 1 was not amended.

It is argued for the petitioner that inasmuch as the Act, as amended, does not expressly require the petitioner to leave a copy of the petition with the local registrar to whom he delivers the petition, and as the rule only speaks of the registrar of the Court of Appeal, there is nothing making it incumbent on the petitioner to leave a copy with the local registrar.

But the Act and the rules must be read together as part of one code. Cl. 2 of Rule 1 was of course framed with reference to cl. 1, which provides that presentation of an election petition shall be made by leaving it at the office of the registrar of the Court of Appeal; and so cl. 2 properly provided that the copy should be left with the said registrar.

The effect of 62 Vict., (2nd sess.) ch. 6 (O.), however, is to modify Rule 1, which must now be read as containing directions for leaving the petition at the office of the registrar of the Court of Appeal or of the local registrar of the High Court, as the case may be.

The Court of Appeal being the only Court for dealing with election petitions, and all petitions being required to be entitled in that Court, they must be taken to be received for it by the local registrars, who are constituted registrars of the Court for the purpose. Thus cl. 2 applies to make it the duty of the petitioner to leave with the petition a copy thereof

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for the registrar, to whom, or at whose office, the petition is to be delivered to send to the returning officer.

I agree therefore that the petitioner was in default in not complying with the requirement of the rule in that behalf.

But the duty is imposed by rule and not by statute; and the provision as to the time when it is to be performed is subject to Rule 58 enabling the Court or a Judge, in a proper case, to increase, enlarge, or abridge the time appointed by the rules for doing any act or taking any proceedings.

It can make no difference that the rule says, that the copy shall be left at the same time as the petition, instead of saying, as it might, that it shall be left within 48 hours or a week after the delivering of the petition. In either case there is a time appointed for doing an act or taking a proceeding.

The power given by Rule 58 is wider than that under the English rules, which were the guide in the *Lisgar* election case, 20 S.C.R. 1, and the *Burrard* election case, 31 S.C.R. 459.

Section 64 of the Dominion Controverted Elections Act, to which reference was made in the latter case, is more restricted in its terms than Rule 58. It does not extend to enabling an enlargement of time although the application is not made until after the expiration of the time appointed.

This rule appears to me to furnish a satisfactory answer to the argument, that the leaving of the copy of the petition is part of the presentation of the petition, without which it is incomplete. That argument proceeds upon the proposition that the two things are directed to be done, and must be done together. But though *directed* to be done together, they are not necessarily, and in every case, to be done together, because the Court or a Judge may increase or enlarge the time for the doing of the second act.

The next question is whether in this case the time should have been increased or enlarged upon the application of the petitioner?

Neither the Act nor the rules specify any time or number of days within which the copy of the petition is to be sent to the returning officer. By Rule 9 the registrar is required to send it forthwith upon the presentation of the petition and the



notice of deposit of money—that is, within a reasonable time afterwards.

There is thus less difficulty, in the absence of proof of substantial prejudice, in relieving against what is shewn to have arisen from a misunderstanding of the practice or a misconception of the requirements of the Act and rules, and not from intentional disregard of well understood procedure.

The question what was necessary to be done is not at all free from difficulty. Even if the solicitor had the rules before him he might have fallen into the same error, and although he could, in a case of such doubt, have adopted the safe course and would have acted more prudently if he had, yet his failure to do so was in good faith, and he ought not to be held strictly to the consequences of his mistake: *McFeeters v. Dixon* (1870), 3 Ch. Ch. 84, at p. 88.

I think, therefore, that the time should have been enlarged on proper terms.

I would allow the appeal, but inasmuch as the petitioner was at fault in the first instance, and as the points involved are new to some extent, the costs of the two motions should be costs in the petition to the respondent in any event, and the costs of the appeal should be costs in the petition. The order of dismissal of the petition should be discharged.

OSLER, J.A. :—I agree in the result.

The leaving of a copy of the petition with the local registrar, if required at all, when the petition is presented by delivering it to that officer under section 10 of the Ontario Controverted Election Act as amended and re-enacted by 62 Vict. (2nd sess.) ch. 6 sec. 2 (O.), is required, not by the Act, but by Rule 1 (2) of the General Rules and Orders, and by giving a large and beneficial construction to that rule, so as to make it apply, though it does not in terms do so, to the case where the petition is presented by delivery to the local registrar.

The rules, no doubt, by sec. 112 of the Act, have the same force as if they were enacted in the body of the Act, but then Rule 58 expressly confers power upon the Court or Judge to increase, enlarge, or abridge the time appointed by the rules for doing any act or taking any proceedings, upon such terms, if

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any, as the justice of the case may require; and, therefore, in a proper case, to extend the time for leaving a copy of the petition with the local registrar for the returning officer if, as I have said, Rule 1 (2) requires that to be done in such a case as the present.

The solicitor had, it seems, only the Act to guide him, and from that he certainly could not have learned that he ought to have left a copy of the petition with the local registrar. He ought to have had the rules also, and I do not know that he had any excuse for not having them, as they are easily accessible; but if he had had them before him, though caution might have prompted him to run no risk, I think he would have fallen into a very pardonable error if he had concluded that the Rule 1 (2) did not apply to his case. There has been no delay in applying for relief, and no harm has been done by the slip either to the respondent or to the public, inasmuch as the petition at once received, through the newspapers, though not in the technical way required by sec. 12 (2) of the Act, the widest publicity.

I agree with the late Chief Justice of the Supreme Court: "That, in dealing with election cases it should be a golden rule that, if there is any possible way of avoiding giving effect to technical . . . objections, and thus preventing a trial on the merits, we should act upon it:" The *Lisgar* case, 20 S.C.R. 1, at p. 7.

That was said in reference to preliminary objections to a Dominion election petition, but its application seems *a fortiori* to the objections taken in the present case.

I think, with deference, that it is, at the least a case for relieving the party under the provisions of Rule 58, and, upon the whole, am content with the order proposed by the Chief Justice.

GARROW, J.A., concurred.

STREET, J.:—In my opinion, the alteration in the Controverted Elections Act effected by 62 Vict. (2nd sess.) ch. 6, sec. 2 (O.), by which petitions in outer counties are required to be filed with the local registrar of the High Court for the county

instead of, as formerly, with the registrar of the Court of Appeal in Toronto, did not carry with it by necessary implication the obligation imposed by Rule 1 (2) of leaving a second copy of the petition with the local registrar at the time of filing it.

The statute as amended is complete in itself without the rule: the local registrar is required by sec. 12 of the Ontario Controverted Elections Act to send a copy of the petition to the returning officer: but it seems to me that, unless we are to import into the statute or the rule something which is not to be found there, we cannot say that the petitioner is bound to leave with the local registrar a second copy of the petition to be sent to the returning officer.

If the absence of a direction to that effect had left the statute unworkable, then I think we should properly have assumed the obligation to exist: but I think it easier to assume that the intention of the statute was that the copy should be made by the local registrar than to insert in Rule 1 (2) the additions required before that rule could be made to read as imposing upon the petitioner the duty of leaving with the local registrar of the High Court a second copy of the petition.

If, however, this view of the rules is incorrect, I am of opinion, for the reasons given in the judgment of the Chief Justice, that the petitioner should have been allowed, and should now be allowed to make good his omission and to leave a copy of the petition with the local registrar, notwithstanding the lapse of time.

MACLAREN, J.A., concurred in the judgment of the Chief Justice.

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[MEREDITH, J.]

REX v. GILMORE.

1903

July 14.

*Criminal Procedure—Private Prosecutor—Right to Conduct Proceedings—R.S.O. 1897, ch. 96, sec. 9 (3).*

A private prosecutor is no party to a criminal prosecution, and cannot insist that he or his counsel shall aid in the conduct thereof.

This was a criminal indictment for perjury, on which the trial took place in London, in the county court judge's criminal court of the county of Middlesex, on Monday, June 29th, 1903, resulting in an acquittal of the prisoner. On the following day the private prosecutor applied, *ex parte*, at the Weekly Court in London, before MEREDITH, J., for a certiorari, on the ground that he, or his counsel, should have been allowed to conduct the prosecution.

*W. H. Bartram*, for the applicant, contended that it was a principle of the common law that every subject has the right to prosecute in the name of the King, notwithstanding R.S.O. 1897, ch. 96., sec. 9 (3), citing *Reg. v. Murray* (1867), 27 U.C.R. 134; *Rex v. Wilkins* (1833), 1 Dowl. 536; Archbold's Criminal Pleadings, 13th ed., pp. 82-86, 130-1; R.S.O. 1897, ch. 96 sec. 9 (3).

July 14th. MEREDITH, J.:—The accused was charged with the crime of perjury. The private prosecutor was anxious to conduct, or that counsel retained by him should aid in the conduct of, the prosecution. Neither party desired, or was willing, that this should be done. The proper Crown Officer undertook, for the King, the prosecution, and, as the applicant alleges, refused to allow other counsel to conduct, or take part in the conduct of, the prosecution.

This motion was launched for the purpose of having the prosecutor's wishes given effect to: but, though it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to



the prosecution, nor indeed bound by any judgment that may be made in it. He may, with the consent of the proper authorities, proceed in the name of the Sovereign; but, against the will of both parties, he has no power over, or voice in, the proceedings.

For these reasons, apart from any others, the motion is dismissed.

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[MEREDITH, C.J.C.P.]

BOURQUE V. THE CORPORATION OF THE CITY OF OTTAWA.

1903

July 27.

*Municipal Corporations—Contract to Construct Sewers—Interference by Reason of Other Sewers—Liability of Municipality.*

The plaintiff contracted with the defendants to construct certain sewers. In the course of his work the contents of other sewers of the defendants, the existence of which had not been disclosed to him, but which had to be displaced to enable him to complete his work, flowed into the trenches dug by him, and impeded him, and caused him additional expense:—

*Held*, that the plaintiff was entitled to recover from the defendants the loss thus sustained, for the defendants had broken the duty they owed to him, to do nothing to prevent or interfere with his doing the work he had contracted to do.

THIS was an action tried before MEREDITH, C.J.C.P., without a jury, at Ottawa, on May 4th and 5th, 1903. The nature of the action and the facts in evidence are sufficiently stated in the judgment.

N. A. Belcourt, K.C., for the plaintiff.

T. McVeity, for the defendants.

July 27. MEREDITH, C.J.:—Action tried before me at Ottawa on the 4th and 5th May, 1903.

Two questions remain to be disposed of, all the others having been dealt with during the progress of the trial.

1st. The claim of the plaintiff for payment of the \$18,447.56 which, as he contends, remains unpaid on the contract price of the work.

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2nd. The claim for damages occasioned by the contents of certain city sewers which existed in the streets in which the plaintiff was required to build the sewers which he contracted to construct, and the existence of which was not known to and was not disclosed to him, flowing into the trenches dug by him and impeding and delaying him in the work and causing him additional expense in the doing of it.

The first of the claims is not, in my opinion, maintainable.

[The learned Chief Justice here stated his reasons for so holding, based upon the special terms of the contract, and not necessary to report here, and proceeded]:

The second claim arises in this way: In the course of the work municipal sewers were met with running along, not across, the streets in which the plaintiff had to make his excavations; the existence of these sewers was not communicated by the defendants to him and he was unaware of it until he met them; the sewage and water from them when the sewers were displaced, as they had to be in order to complete the work, flowed into the trenches which the plaintiff was excavating and impeded the work as well as caused him expense in getting rid of the sewage and water, as he was compelled to do in order to go on with his work. The damage suffered by the plaintiff from this cause was estimated by the defendant's engineer, who had charge of the works, at \$623 for Elgin street, \$1,687.50 for Isabella street, and \$500 for Banks street; in all \$2,810.50.

It was objected on the part of the defendants that this loss was one which the plaintiff must himself bear, or, at all events, could not look to them to make good. Reliance was placed on paragraph 3 of the specifications, but it, I think, does not apply to sewers which were laid along and not across the streets. The sewers with which that paragraph deals are spoken of as "intersecting" sewers, which I take to mean sewers which crossed the line of the work.

The defendants further objected that in any case they were under no obligation to guard against any such difficulty as the plaintiff met with, and that they did not in any way warrant that the work could be done without meeting with such difficulties, or become liable for the consequences of any damage

being done to the plaintiff from the sewers being met with.

The plaintiff contends that the defendants owed him a duty to do nothing to prevent or interfere with his doing the work which he contracted to do, and that in discharging through the sewers under their control upon his work the sewage and other matter which they carried, the defendants committed a breach of that duty, for which they are answerable to him in damages.

These sewers were not private drains, but, as I have said, municipal sewers belonging, as I understand, to the defendants, and into which the property owners were required to drain their houses and property, and which carried the drainage of the streets also, and it would certainly be most unjust if the defendants were permitted to discharge the contents of these sewers into the trenches which the plaintiff was required to dig, to his loss and damage, without being liable to make compensation to him for it. I have had some doubt as to the legal liability of the defendants, but upon the whole have come to the conclusion that the plaintiff's case is made out and that he is entitled to recover from the defendants the \$2,810.50 which, as I have said, is the loss he has sustained by the acts of which he complains, as estimated by the defendants' own engineer. The principle which the plaintiff invokes in aid of his claim is, I think, properly applicable to the circumstances out of which that claim has arisen, and if it turns out that I err in so deciding it will be satisfactory to me to feel that I have done so in favour of a claim which in my opinion is a just one.

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[IN CHAMBERS.]

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July 24.

McINTYRE v. MUNN.

*Motion for Judgment*—"Debt or Liquidated Demand"—*Con. Rules 138 and 603.*

The defendant having entered into an agreement to manufacture for and deliver timber to the plaintiff received from him certain advances in money exceeding the value of the timber actually delivered; and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained.

In an action to recover the balance of the advances unpaid:—

*Held*, that the claim was not a "debt or liquidated demand" within the meaning of *Con. Rule 138*: and an order of a local Judge, giving leave to sign judgment under *Con. Rule 603*, was set aside.

THIS was an appeal by the defendant from an order made by the county Judge of the county of Bruce dated the 15th of July, 1903, giving leave to the respondent to sign judgment against the appellant, under *Con. Rule 603*, for \$500.

The appellant had entered into an agreement to manufacture for and deliver to the respondent a certain amount of timber and had received certain advances in money on account of the contract. The appellant failed to complete the contract and the respondent brought this action for the difference between the value of the timber delivered and the advances made, alleging that the appellant was overpaid.

The appeal was argued in Chambers on the 21st of July, 1903, before MEREDITH, C.J.C.P.

*G. H. Kilmer*, for the appeal.

*M. H. Ludwig*, contra.

July 24. MEREDITH, C.J.:—The single point for determination is, whether the claim in respect of which the leave was given was one which might be specially endorsed according to the provisions of *Con. Rule 138*.

The action, so far as this claim is concerned, is brought to recover the balance of certain moneys, which were advanced by the respondent to the appellant on account of the price of timber, which by an agreement, dated the 2nd October, 1902,



the appellant contracted to manufacture for and deliver to the respondent, after deducting from the amount of the advances, what, according to the respondent's contention, the appellant was entitled to be paid for the timber which he had delivered.

The agreement provides for payment of the price of the timber upon delivery.

No adjustment of the accounts between the parties appears to have taken place; and there was no ascertainment of the amount which the appellant was entitled to be paid for the timber delivered.

Is this claim then one to recover a debt or liquidated demand in money upon a contract express or implied, within the meaning of the Rule?

I think not. There never was any contract to repay the advances as such, but only an implied contract to repay on completion of the contract, what, if anything, after crediting upon the advances what the appellant should be entitled to be paid for the timber which he had delivered, it should be found that he had been overpaid.

Such a claim—the amount of the credit not having been ascertained by the acts of the parties—is clearly neither a debt nor a liquidated demand in money.

The order must, therefore, be set aside, and in lieu of it, an order be made dismissing the motion for judgment.

The costs here and below will be to the appellant in any event of the action.

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July 24.

[MEREDITH, C.J.C.P.]

## RE MACKEY.

*Will—Devise of Debentures—Specific Legacy—Succession Duty.*

A testator possessed of a considerable number (more than 5) of \$1000 debentures, bearing interest at four per cent. of a certain city, both at the time of making a codicil to his will and at the time of his death, by the codicil devised to each of two devisees "one debenture of" (the city) "for the sum of \$1,000 bearing interest at four per cent. per annum"; and directed "that if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture for the sum of \$1,000 bearing interest at four per cent. :—

*Held*, that the legacies to the two legatees were not specific legacies; and that even if they had been, the legatees were not entitled to receive them free of succession duty which the executors should either deduct or collect the duty before payment.

THIS was an application by way of originating notice made to the Court for the determination of certain questions arising upon the will of the late William Mackey and the codicils to it.

The application was argued in Court at Ottawa on the 2nd July, 1903, before MEREDITH, C.J.C.P.

*M. J. Gorman*, K.C., for the executors.

*W. D. Hogg*, K.C., for the residuary legatees.

*D'Arcy Scott*, for the specific legatees.

*R. G. Code*, for other legatees.

*Gideon Grant*, for Henry Mackey.

July 24. MEREDITH, C.J.:—I dealt on the argument with all the questions raised except those relating to the legacies to Mr. Scott's clients, Alice Cassidy and Agnes Cassidy, which were bequeathed to them by the codicil of the 22nd September, 1902, and as to them I reserved judgment.

The provisions of the codicil, as far as they relate to these legacies, are as follows:—

"3. I give and bequeath to Alice Cassidy, in recognition of her faithful service in my household, one debenture of the city

of Ottawa for the sum of \$1,000, bearing interest at four per cent. per annum. Meredith, C.J.  
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"4. I give and bequeath to Agnes Cassidy, in recognition of her faithful service in my household, one debenture of the city of Ottawa for the sum of \$1,000, bearing interest at four per cent. per annum. RE MACKAY.

"5. I will and direct, that if I should deliver over any of the said debentures in my lifetime to any of the above named legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered."

By paragraphs 1 and 2, the testator bequeathed to each of five named persons one debenture of the city of Ottawa for the sum of \$1,000, bearing interest at four per cent.

At the time the codicil was executed and at the time of his death, the testator was possessed of a considerable number (many more than five) of debentures of the corporation of the city of Ottawa for \$1,000, each bearing interest at four per cent. per annum.

It was contended by Mr. Scott, that the legacies to Alice Cassidy and Agnes Cassidy were specific legacies; and that the legatees were entitled to have transferred to them respectively one of the \$1,000 debentures owned by the testator; and that they were also entitled to the coupons for the interest, which were current and had not become due at the time of the testator's death; and he also contended, that the executors were not entitled to deduct the succession duties payable in respect of so much of the testator's estate, as was represented by the debentures, or to require the legatees to repay what the executors had paid for succession duties in respect of it.

I do not think that the legacies are specific.

It is difficult to determine what a specific legacy is, or to state the test for distinguishing such a legacy from a general bequest, and it has been said by a Lord Chancellor, that though various attempts have been made at definitions, there were objections to most of them; and it would, I think, serve no good purpose to go through the cases for the purpose of extracting from them such definitions as have been given; but it will suffice to refer to some of them, and I therefore mention *Purse v. Snaplin* (1737), 1 Atk. 414, at p. 417; *Bothamley v.*

Meredith, C.J. *Sherson* (1875), L.R. 20 Eq. 304 (Jessel, M.R.); *In re Ovey*,  
1903 *Broadbent v. Barrow* (1882), 20 Ch. Div. 676, at p. 684 (Lind-  
RE MACKAY. ley, L.J.); *Robertson v. Broadbent* (1883), 8 App. Cas. 812, at  
p. 820 (Lord Blackburn referring to what had been said by  
Lord Cairns, in the same case); and I refer also to Williams on  
Executors, 9th ed. 1019, and the American and English  
Encyclopædia of Law, 2nd ed., vol. 18, p. 714.

Nor do I think it necessary to go through the numerous cases, in order to support the conclusion which I have reached. It will be sufficient to refer to a recent, if not the most recent, English authority on the subject of specific legacies: *Re Nottage, Palmer v. Jones, No. 2*, [1895] 2 Ch. 657.

There is not in this case anything to indicate that the testator in bequeathing the Ottawa debentures was dealing with property that he held, or to shew that he did not mean that the legacies might be satisfied by procuring and transferring or by transferring, if they formed part of his property at the time of his death, to the legatees any debenture answering the description contained in the codicil. In the absence of any indication such as was found in the case referred to, it is well settled that a bequest of so much stock or debentures, although the testator possesses stock or debentures of the kind described, is not a specific bequest:

The only provision of the will that seems at all to indicate that the testator was dealing with debentures which he owned, is that contained in paragraph 5, which provides for the case of his having delivered over "any of the said debentures in his lifetime to any of the above named legatees." This looks as if the testator had in view debentures of which he was the owner, and which he might hand over, but the language is equally applicable to the case of his procuring and then delivering over to the legatees a debenture answering the description contained in the codicil.

It is to be observed, that when the testator intended a legacy to be specific, he made his intention clear by referring to the subject of it as being owned by him, or by describing it accurately, and so as to identify it, and to distinguish it from all other things of the same kind. This he does in the legacy to Henry of \$8,000 of the paid up stock of the McLennan Paint Company, Limited, which he refers to, as being owned



by him (paragraph 5 of the will): in the bequest contained in paragraph 9 of the will of fourteen waterworks debentures, which he specifically describes: and in the bequest in the first paragraph of the codicil of the 4th November, 1902, of two hundred shares of the capital stock of the McLennan Paint Company, Limited, which he describes, referring to them as "now represented by four stock certificates numbered respectively 306, 307, 308 and 309, for fifty shares each, dated the sixteenth day of May, 1902, and bearing interest at the rate of seven per cent. per annum."

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RE MACKAY.

Having reached the conclusion that the legacies are not specific; the only ground on which Mr. Scott based his contention that the legatees are entitled to receive them free from succession duties falls to the ground; but had I been of opinion that the legacies were specific, I should have held that Mr. Scott's contention equally failed. The succession duties fall according to the Act (R.S.O. 1897, ch. 24), upon the property of the testator in the hands of his personal representatives; and by section 14, it is made their duty to deduct the succession duty from any estate, legacy or property, subject to the duty, which they have in charge or trust, or to collect the duty thereon upon the appraised value thereof from the person entitled to the property; and they are forbidden to deliver any property, subject to the duty to any person, until they have collected the duty on it.

The language of the section applies plainly, I think, to a specific legacy, and there is no ground for the contention that the succession duties on legacies should be paid out of the residue: *Kennedy v. Protestant Orphans Home* (1894), 25 O.R. 235; *Manning v. Robinson* (1898), 29 O.R. 483. See also *In re Maryon-Wilson, Wilson v. Maryon-Wilson*, [1900] 1 Ch. 565.

The costs of all parties will be paid out of the estate; those of the executors between solicitor and client. This will include the costs of Henry Mackey, which I think it better to deal with now than to reserve to be dealt with after the determination of any action which may be brought to try his right to the legacy of \$8,000 of the paid up stock of the McLennan Paint Company, Limited, bequeathed to him by the will.

## [IN THE COURT OF APPEAL.]

C. A.

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June 29.

GRIFFITHS

V.

THE HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

*Negligence—Evidence—Workman's death without witnesses—New trial.*

Plaintiff's son and another labourer were directed to clear up and remove the rubbish, caused by their cutting a trench in the concrete floor of an alley-way in the defendants' power house. The alley-way was crossed at right angles by others, and on each side of the former were electric machines and live wires within arms length of any one working in the trench. The other labourer went into a cross alley-way where the live wires were, although a slat had been nailed across it when they were both put to work, and was sweeping towards the trench the litter that had been scattered about, when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switch-board, plaintiff's son being dead. It was shewn there was a rupture in the insulation of a loose loop or cable hanging from the switch-board directly over where the survivor was lying, and that the insulation of the wires was, with respect of the voltage passing, insufficient for the safety of anyone working among them; and that the hanging loop might easily have been better guarded than it was:—

*Held*, that there was evidence which could not be properly withdrawn from the jury and a new trial was ordered.

THIS was an appeal by the plaintiff from a judgment at the trial, in an action by one William Griffiths, as administrator of the estate of his son, the late William Dexter Griffiths, for the death of the latter, who had been killed while working in the power house of the defendants by, as alleged, an electric shock.

The trial took place at St. Catherines, before Falconbridge, C.J.K.B., with a jury. The learned Chief Justice ruled that there was not sufficient evidence as to how the accident had happened, and dismissed the action.

The appeal was argued on the 26th and 27th of May, 1903, before MOSS, C.J.O., OSLER, MACLENNAN, and MACLAREN, JJ.A.

*G. Lynch-Staunton*, K.C., for the appeal. The two men were properly where they were working, and their position and work were extra hazardous, 22,000 being the voltage on the wires—1500 being sufficient to cause death—and the defendants were fully cognizant of the existence of the danger. The cause of the death was proved to be by an electric shock, and although it was

also proved that there was a hole in one of the electric cables, it was not necessary that the plaintiff's case should depend upon that defect. The defendants should have taken every possible precaution, which they could have done, and so protected the men, either by turning off the power, raising the switch-boards higher, or providing marble barriers and making recesses, which latter method is usual and has been in use for over five years. The defendants brought a dangerous element or force into their premises and among their workmen, and were bound to keep that element and force confined, or to prevent its escape among the workmen: *The Citizens' Light and Power Co. v. LePitre* (1898), 29 S.C.R. 1; *Randall v. Ottawa* (1903), 2 O.W.R. 146, 19 February, 1903, and cases there cited; *Myham v. Louisiana Electric Light & Power Co.* (1890), 7 L.R.A. 172; *Western Union Telegraph Co. v. McMullen* (1896), 32 L.R.A. 351 at p. 352 (note); *The George Matthews Co. v. Bouchard* (1898), 28 S.C.R. 580. The defendants did not comply with the Factory Act, R.S.O. 1897, ch. 256; *Groves v. Wimborne*, [1898] 2 Q.B. 402. The onus of shewing proper protection is on the affirmative: *Fahey v. Jephcott* (1901), 2 O.L.R. 449; *Badcock v. Freeman* (1894), 21 A.R. 633; *The Asbestos and Asbestic Co. v. Durand* (1900), 30 S.C.R. 285.

*M. Brennan contra.* The plaintiff has not proved the cause of the death. The trial Judge followed *Kervin v. The Canadian Coloured Cotton Mills Co.* (1896), 28 O.L.R. 73, and properly dismissed the action. The Factory Act and cases decided under it do not apply. There were no electric machines manufactured at the *locus in quo*. The men knew their danger and should not have gone near the switch-boards, particularly as slats were put up as barriers to prevent them, and act as a warning, which was disregarded. The power house was constructed in the very best and most scientific manner, and it is no negligence that the defendants did not alter its construction and equipment from day to day as further discoveries were made in electricity, but even if it were so, the presumption is in favour of proper protection, and no notice or knowledge has been brought home to the defendants.

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*Lynch-Staunton*, in reply. The workmen here were children *qua* this cable: *Sangster v. The T. Eaton Co.* (1894), 21 A.R. 624. See also Beven on Negligence, 2nd ed., 146.

June 29. OSLER, J.A.:—Action for negligently permitting defendants' cables, wires, etc., to be in an unsafe and dangerous condition, whereby plaintiff's intestate, working among them under the orders and direction of the defendants lost his life.

The facts disclosed in the plaintiff's case, briefly stated, are as follows:

The deceased was a labourer, and with his fellow workman, one Higgins, was, on the 1st July, 1902, ordered to cut a trench or opening at two places in the concrete floor of the defendants' power-house. This floor may be said to be covered with the various sorts of electrical apparatus, used for the development and transmission of electric power, such as cables, wires, switch-boards, transformers, etc., access to and among which is obtained by passages, spoken of in the evidence as alleys or alley-ways, some passing east and west lengthwise through the room and others transversely, called the north and south alleys, crossing the former from one side of the room to the other.

On each side of the former is a series of switch-boards, from each of which depend two loose loops or coils of wire, the ends of which are attached to a moveable handle. These wires pass through the switch-board and are connected through the transferrer with the generators.

The trenches were to be cut in the transverse or north and south alleys at the east end of the room. The cables in the works adjoining the north alley were dead, and there was no danger in working there. Those in the south alley were alive.

According to the evidence of Higgins, he and his fellow workman were directed to clear up and remove the rubbish, which would be made in cutting the trench in the concrete, which, from its hard and brittle character, was apt to fly and make a litter in every direction. They were engaged in doing this when the accident happened.



Higgins said that he had gone into the east alley, *i.e.*, that part of the east alley, which was east of and immediately opposite or at right angles to the south alley, in which one of the trenches had been cut, and was sweeping out the litter from there towards the trench when he suddenly became unconscious, receiving, as there can be no doubt he in some way did, a very severe electric shock. He had just before this noticed the deceased stooping over the trench about four feet distant from him. Live wires, it may be said, were proved to have been in the east alley, within arm's length of anyone working in the trench. The bodies of both men were discovered lying near each other, just east of the switch-board in the east alley, that of Higgins being a little nearer, to the northerly of the two switch-boards.

From the evidence it may also be inferred that the deceased in some way received an electric shock and that this was the cause of his death. Whether this was at the same time as Higgins, or immediately or soon afterwards, does not appear.

To prove defendants' negligence, it was shewn, that there was a break or rupture in the insulation of the loose loop or coil of cable hanging from the switch-board directly over where Higgins was lying—such as might be caused by its being bent backwards and forwards in its constant use. There was also evidence, that, having regard to the enormous voltage passing through the wires, this insulation was quite insufficient for the purpose of safety to any one working among them, in an unprotected condition, even though he did not come into actual contact with them, and also that the depending loop or coil might easily have been better guarded than it actually was.

The defendants contended that neither of the men had any right to be where he was; that the east alley had in fact been fenced off or warned against by a slat or lath nailed across it when they went to work; that, if they had remained in the alley where the trench was cut, they would have sustained no injury, and, lastly, that there was no evidence from which it could be inferred how the accident happened. No one saw the occurrence (as regards the deceased), and it might have occurred through the negligence of the injured men themselves.

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Whatever may be said of the case hereafter, when the evidence on both sides is in, I think that as it stood at the close of the plaintiff's case, there was evidence in support of it which could not properly have been withdrawn from the jury. The men were not forbidden to go into the east alley, and it would be quite permissible for the jury to find on the evidence of Higgins, that their instructions were such as to require them to clean up any litter or rubbish which got there in the course of their work. I by no means intend to say, that the jury would be bound to infer this, or that there was not evidence—such as the putting up the slat or lath—which would justify the contrary inference.

As to the cause: if the men were lawfully in the place where they were found, one of them dangerously shocked and the other dead, they were working there, without having had any special warning on the subject, in a place where a single unguarded movement might bring either of them in contact with death from the ruptured wire, or even if, as one witness suggests, the rupture might have occurred at the moment, then from a wire insufficiently insulated or insufficiently guarded. There is no reason that I can see to look further and imagine possible negligence on the part of the men themselves.

They were sent or permitted to go into a place where danger of the very highest degree existed, and the defendants' duty to their servants in such circumstances is aptly described in the language of the late Chief Justice of the Supreme Court in *The Citizens' Light and Power Co. v. LePitre*, 29 S.C.R. 1: "Persons dealing with dangerous things should be obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end," p. 5. And see *Mather v. Rillston* (1895), 156 U.S. 391 cited in note to Shearman and Redfield on Negligence, 5th ed., sec. 189, note, p. 294: "In all occupations attended with great and unusual danger there must be used all appliances readily obtainable known to science for the prevention of accidents."

It appears to me that there was evidence that the death of the deceased was owing to the neglect of some precaution of this nature, or to the damaged condition of the wire close to which his body was found. I think

it is quite immaterial whether both the men received the shock concurrently, one through the other, or whether Griffiths' came after his fellow servant had been struck. It is enough that he was not wrongfully in the place where he met with his injury.

The appeal should be allowed with costs, and the costs of the last trial to be paid by the defendants.

MOSS, C.J.O., MACLENNAN, and MACLAREN, JJ.A., concurred.

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## [IN THE COURT OF APPEAL.]

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## LA BANQUE PROVINCIALE V. CHARBONNEAU.

*Negligence—Material Alteration in Note—Liability of Branch Manager of Bank—Disobeying Instructions.*

The defendant, a branch manager of the plaintiffs', accepted a joint instead of a joint and several promissory note as security for an advance, although expressly instructed to require the latter. On discovering the mistake, he inserted the words "jointly and severally" in the belief that this alteration was to be initialled by all the makers, which, however, was not done. After consulting the bank's solicitor, the defendant crossed out the inserted words. In the result the plaintiffs were held to have lost their remedy on the note on the ground of material alteration, and brought this action against the defendant for damages:—

*Held*, that since the note as taken was to all intents and purposes as valid as if made jointly and severally, only nominal damages were recoverable against defendant for his breach of duty in this regard.

*Held*, also, (Osler, J.A., dissenting) that the defendant was not liable for the result of his subsequent acts, since he acted in good faith, and in ignorance of the legal consequences, and had exercised reasonable care and diligence under all the circumstances, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable.

THIS was an appeal from the judgment of Meredith, C.J.C.P., in favour of the defendant at the trial of this action at the spring non-jury sittings at Ottawa, on June 20th and 21st, 1903, which was for damages under the circumstances set out in the judgment of OSLER, J.A., and also in the report of the case *La Banque Provinciale v. Arnoldi*, 2 O.L.R. 624.

The appeal was argued on February 5th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW and MACLAREN, J.J.A.

A. B. Aylesworth, K.C., and W. H. B. Parry, for the plaintiff, contended that it was clearly negligence for the defendant not to have noticed that the note taken was joint only, and not joint and several; that he further risked everything on the chance that the three substantial sureties would afterwards ratify what he had done; that the solicitor's advice was good under the circumstances; that the defendant's good faith made no difference; that he disobeyed instructions and was liable for the full amount of the loss; that having deviated from his instructions, his duty was to inform his principal at once, but



he did not do so: *Banque Provinciale v. Arnoldi* (1901), 2 O.L.R. 624; *Bank of Owensburg v. Western Bank* (1877), 13 Bush. (Ky.) 526; *Butts v. Phelps* (1883), 79 Mo. 302, 304-5.

*W. D. Hogg*, K.C., and *F. A. Magee*, for the defendant, contended that, though he did not obey his instructions, there was no negligence, because the makers were good and it made no real difference; that there was only nominal negligence here; that in the matter of the alteration of the note, also, there was no actionable negligence; that this was done on the suggestion of two of the makers, who afterwards broke faith with him about getting the others to initial; that the defendant, who was a young man, thought if he went to the others they would repudiate the whole transaction, and so went to the solicitor of the bank, who advised him the note, notwithstanding the alteration was a good note; that the law should not make bank managers insurers of their business: *Jenkins v. Betham* (1854), 15 C.B. 168; *Chapman v. Walton* (1833), 10 Bing. 57; *Sutherland on Damages*, 3rd ed., vol. 3, p. 1799; *Sedgwick on Damages*, 8th ed., vol. 2, p. 567; *Mayne on Damages*, 6th ed., p. 47.

*Aylesworth*, in reply.

June 29. *MOSS*, C.J.O.:—The action of the defendant in accepting a promissory note which was not joint and several and did not bind the parties jointly and severally was undoubtedly a breach of the instructions which he received from his superior, and if the plaintiff's loss had been occasioned by that act the defendant would have to make good the amount. But the form of the note which he did take was sufficient to secure to the bank the liability of the parties in this Province as effectively to all intents and purposes as if the note had been in the exact form called for by his instructions, and, therefore, no more than nominal damages to the plaintiffs resulted from that act or omission.

The next enquiry is, should the defendant be held liable for the consequences of his subsequent act? Because of his instructions and probably, also, because he was more cognizant of the laws of Quebec than of Ontario, the defendant naturally

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attached importance to the note being expressed to be joint and several, and upon discovering that it was not in that precise form it was to be expected that his mind would be directed to endeavouring to repair what he thought was a material objection.

It cannot be said that he had any intention of injuring or impairing the plaintiffs' position or that he was guilty of misconduct in that sense. His object was to do something which would improve the plaintiffs' position if possible. The case is not one of intentional injury to his employers, but of an act done in good faith and with a purpose meritorious in itself.

The question is, did the defendant exercise such a reasonable degree of skill, care and diligence as was required of him under the circumstances, or did he shew such a want of capacity or want of attention to the plaintiffs' interests as to render him responsible for the loss which occurred? And that is a question to be determined upon the circumstances of the case, taking into consideration the plaintiffs' knowledge of the defendant's capacity and fitness for the position; their subsequent knowledge of what had been done, and their attitude with regard to it before the loss had actually occurred.

The defendant was, of course, bound to exercise reasonable care and diligence in looking after and protecting the plaintiffs' property in his possession or under his control, including, of course, the promissory note which he had received for the plaintiffs upon the transaction in question. But the plaintiffs cannot expect their managers or cashiers to be infallible, or that they may never fall into an error of judgment save at the peril of having to make good any loss occasioned by the mistake. Nothing higher could be required of the defendant in his position than reasonable skill and ordinary diligence, by which is understood such skill as is ordinarily exercised by persons of average capacity engaged in similar pursuits. A loss caused by an act or step which a banker of experience acting in similar circumstances might be liable to do or take is not a loss for which the bank can look for indemnity from the person whose error caused the difficulty.

In the present case the evidence shews that the defendant wrote the words "jointly and severally" into the note with the idea of making it conform to the intention of the parties, and

under the belief that all the parties to it would assent to the change and ratify it by their initials. Two of the parties to the note by their words and conduct led him to that conclusion, and it was not until after the words had been written that doubts were raised and he was led to think that he had acted prematurely. Upon that he hesitated as to whether he should present the altered note to the other makers and was led to conclude not to do so. His next proceeding was what any prudent person would adopt. He consulted the bank's solicitor and was advised by him that under the circumstances the validity of the note was not affected. This advice would, of course, tend to strengthen his conclusion not to endeavour to get the initials of the other makers to the alteration. The defendant afterwards informed the general manager of what had taken place. That officer did not take the position that the note was rendered invalid, and the only suggestion or direction he gave to the defendant was to see that the next note was in proper form. The opinions of the general manager and of the solicitor appeared to coincide that no harm had been done by the writing on the note and seemed to render it unnecessary for the defendant to take immediate action.

The evidence as a whole seems to me to relieve the defendant from the charge of gross negligence which it was incumbent upon the plaintiffs to establish. He cannot be said to have been guilty of negligence in the sense that he acted in a manner in which no person in his position exercising ordinary care and judgment would have acted. Under the circumstances he had reasonable grounds for supposing that what he was doing would be implemented by the parties to the note, and his action after the difficulty arose was under the advice and with the cognizance of the plaintiff's officials. That in the result his judgment proved to be wrong and his act prejudicial to the plaintiffs is not enough, in my opinion, to render him liable: *The Corporation of the Township of Stafford v. Bell* (1880), 31 C.P. 77, 6 A.R. 273.

I think the appeal should be dismissed.

GARROW, J.A., concurred.

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OSLER, J.A.:—The defendant was the salaried manager of the Ottawa Branch of the plaintiffs' bank. A partnership firm styled the Citizens Exchange and Loan Agency applied to him for a loan or credit of \$5,000, which, after some correspondence with the bank's head office, the defendant was authorized to grant on its being collaterally secured by the joint and several promissory note of certain named persons. A note required by these persons was handed to the defendant by a member of the firm, and a note of the firm at a shorter date was discounted and the money advanced to them thereon.

By some oversight on the defendant's part the collateral note accepted by him, instead of being the joint and several note of the makers in accordance with his express instructions, was their joint note only. Shortly afterwards the defendant became aware of his error and sent for two of the makers, one whom was a member of the firm, and pointed out the mistake. A discussion took place as to what should be done to rectify it. The defendant said that either a new note should be obtained or the erroneous one corrected.

According to the evidence at the trial these two makers "seemed to be satisfied" to adopt the latter course, and he thereupon wrote in the words "jointly and severally," the "understanding" being that "we were to go round to the makers and get them to initial" the alteration, that is "to get them to consent to it." Then Arnoldi said that he did not care about writing these people, *i.e.*, the other makers again, and the defendant inferred from the course of the conversation that they might refuse to initial the alteration, and that it would be better for the bank that the note should remain as it was. Arnoldi said "If you will keep the note like that I will make sure that the next note (the renewal) will be a joint and several one—better hold the note like that till it comes due and I will give you a note made properly."

The defendant in consequence made no attempt to get the alteration initialed, and shortly afterwards took it to his solicitor, told him the facts, and asked what he should do. The latter advised him not to erase the added words, but to pass a line through them with his pen, which he accordingly did. When the time came to renew the note, a renewal was



brought in the required form which the defendant accepted without noticing that it had not been signed by one of the substantial parties, one King Arnoldi, and his signature never was, in fact, obtained to it. The bank was advised that the omission did not affect the liability of the other makers. An action was brought against all the makers of the first note, including King Arnoldi, and against those who were parties to the second note. By this time the alteration of the original note had been discovered by the sureties and the result of the action, so far as that note was concerned, was that they were held to have been discharged by the alteration. The action also failed as to those sureties who had actually signed the second note on the ground that the bank had omitted to secure King Arnoldi as a party to it, and on the further ground that having been made in ignorance of the alteration of the first one, in consequence of which the sureties had been discharged, there was no consideration to them for making the second one.

The question is whether, under these circumstances, the plaintiffs have any ground of action against the defendant founded upon his negligence in respect of any of these transactions.

The first act of negligence was that of taking the original note in the form of a joint note only, contrary to the plaintiffs' express instructions to accept only the joint and several note of the proposed makers. It is evident from the correspondence between the defendant and his superior that the latter, for some reason, attached great importance to this point and it cannot be denied that in taking the security in the form in which he had been told not to take it, there was a negligent breach of his instructions.

No loss or damage, however, was directly sustained by the plaintiffs in consequence of this.

The joint note of the makers was, for aught that has been shewn, quite as useful a security as one on which they were liable jointly and severally, and I therefore agree with the learned Chief Justice at the trial that, inasmuch as the damage the plaintiffs complain of did not flow from this act of negligence, nominal damages only are recoverable by them in respect of it.

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The further ground of negligence is the alteration by the defendant of the first note and his omission to have such alteration assented to and confirmed by the makers. To this their loss was no doubt directly attributable. It is unnecessary to comment upon the defendant's neglect to have the second note signed by all the makers because, even had he done so, the bank, having regard to one ground on which those who signed it were exonerated, namely, the alteration of the first note, would have been in no better position.

Differing with some regret from my learned brethren, and with a natural distrust under the circumstances of my own opinion I cannot but think that the defendant ought to be held guilty, in respect of what I am now dealing with, of culpable negligence.

He had applied for and had accepted for reward an important position in the plaintiffs' service. It was his duty to exercise in the performance of the business entrusted to him and in looking after and protecting his principals' property in his custody, a reasonable degree of skill, care and diligence. Whether he was or was not fully alive to the possible consequence of his act, and its effect, if not assented to by all the makers, upon the plaintiffs' security, it was upon the mildest view which can be taken of it as matter of the practice of bankers irregular, and to a person occupying his situation its imprudence and danger ought to have been manifest upon the slightest reflection. A perfectly safe alternative was open to him, as he knew, of procuring a new note of all the parties. Instead of taking this course he adopted the doubtful and hazardous one of altering, or tampering with, the existing security without the authority of the makers, incurring thereby the risk of its destruction if they refused to confirm what he had done. Then, at the instance of one of the principal debtors, he made no attempt to obtain the consent of the other makers to the change. If the case turned upon this omission it may be that the advice he afterwards seems to have obtained might repel the charge of negligence as to it, but I fail to see how that advice or the solicitor's opinion, whatever it may have been as to the effect of the alteration, can relieve him from the imputation of negligence in fact, having regard to what I think

were his duties in the situation he held in the bank's service—duties in this respect, as it seems to me, of the simplest and most obvious character.

The facts are not in dispute and it is open to this Court to draw therefrom an inference different from that which commended itself to the learned trial Judge.

I don't think that any purpose would be served by a discussion of the authorities.

The leading ones are referred to in *The Corporation of the Township of Stafford v. Bell*, 31 C.P. 77; Boustead on Agency, 2nd ed., sections 45, 56, 57; Evans on Agency, 2nd ed., p. 282; Mechem on Agency, secs. 493, 494, 495, 500; *Williams v. McKay* (1885), 53 Am. 775. And the result which has been arrived at by the other members of the court also renders it needless to discuss the question of damages, as to which see *Selz v. Collins* (1893), 55 Mo. App. 55; *Whitney v. Merchants Union Express Co.'y* (1872), 104 Mass. 152; and *First National Bank of Trinidad v. First National Bank of Denver* (1878), 4 Dill. Cir. Ct. Repts. 290.

I think the appeal should be allowed.

MACLENNAN, J.A.:—But for the different opinion of my brother Osler, I should have had no hesitation in affirming this judgment; and having given the case very full consideration I am still of that opinion.

I think the defendant was bound in law to bring to the discharge of his duties the ordinary degree of skill and knowledge which would reasonably be expected from persons occupying his position *per* Parke, B., and Jervis, C.J., in *Jenkins v. Betham*, 15 C.B. 168, 185. The knowledge and skill of such persons vary. There is no school or college where fitness for such positions can be acquired. It must be obtained by service in inferior positions, and by experience. One manager may be a person of long experience, and may have large and minute knowledge of his duties, and of the laws relating to them, and another may be a person of recent appointment, new to its duties and responsibilities, without experience and without much knowledge of the law, beyond what he has picked up in the inferior positions through which he has risen. The exigen-

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cies of banking business require the services as managers, not only of the man of long experience, but also of the man of recent appointment. The defendant was a young man, appointed and acting as a manager for the first time, and his salary was \$1,000 a year, with aspirations to \$1,200. He had been appointed on February 19th, 1898, and the acts of negligence complained of occurred less than nine months afterwards. These acts related to a promissory note of \$5,000, which was to be obtained as security for an advance to a partnership firm of which one E. C. Arnoldi was a member. The defendant's instructions from the head office were to procure a joint and several note from the parties who were offered as sureties. Unfortunately the note was drawn as a joint note merely, and not joint and several; was signed by all the parties; and was brought to the defendant, who accepted it and advanced the money upon it, without observing that it was not joint and several. This he discovered two days afterwards, and sent for Mr. E. C. Arnoldi and drew his attention to it. Mr. Arnoldi said the omission was an oversight, and that he had intended to make it joint and several. Thereupon the words "jointly and severally" were inserted by the defendant with Mr. Arnoldi's concurrence, and it was arranged that they should go together to the other parties to get them to approve of the alteration. This was never done, Mr. Arnoldi and Mr. Bowie, the only other signers who were aware of the alteration, not caring to go round to get the approval of the others. Some days afterwards the manager struck his pen through the words which he had interlined, on the advice of the bank's solicitor, whom he consulted, and who was of opinion that the original validity of the note was not impaired. There is little if any evidence of the degree of skill and knowledge which could be reasonably expected from a new manager, such as the defendant, as to the effect of what he did, that is, the alteration of the note and the subsequent cancelling of the alteration. The opinion of the solicitor is some evidence, for if the bank's solicitor thought the alteration harmless it would be quite unreasonable to expect the defendant to know that it was otherwise. Again, when, the facts were made known and explained to the plaintiff's general manager, it seems not to have occurred to him that the



validity of the note had been impaired or destroyed; and the defendant could not be expected to have a greater degree of skill and knowledge than his superior officer possessed. It was a pure question of law whether what was done avoided the note.

The plaintiffs brought an action upon it, and the question whether or not it had been invalidated was seriously argued both at the trial and on appeal in this Court, eminent counsel for the plaintiffs contending that its validity had not been impaired by the alteration: 2 O.L.R. 624.

Under these circumstances, I think it would be too much to expect the defendant to possess such a knowledge of the law as would have prevented him from endeavouring to comply with his instructions by the means which he used for the purpose.

It was also argued that the plaintiffs' loss was due to actual disobedience of instructions in taking a joint note instead of one which was joint and several. It is, of course, quite true that if that mistake had not been made, there would have been no occasion to make the alteration, and so the disregard of instructions was the cause of the loss. But it is equally true that but for the alteration there would have been no loss, the liability on the joint note being quite as complete as upon a joint and several one. I think the judgment right on this point also, and that the appeal should be dismissed.

MACLAREN, J.A.:—Damages are claimed by the bank from its late local manager at Ottawa on two grounds:—(1) Breach of instructions and negligence in accepting a joint note instead of a joint and several one; and (2) the subsequent alteration and consequent voidance of this note by inserting the words "jointly and severally." His liability on the first ground is not now questioned. Meredith, C.J., who tried the case without a jury, found against him on this point; but as the joint note was, under the circumstances, quite as good as if it had been joint and several, and the bank suffered no damage on this account, there is no good ground for disturbing the judgment of the trial judge in awarding merely nominal damages.

The other ground of action raises a question of greater difficulty. By the alteration of the note by the defendant, the

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bank lost the amount which it had advanced, less a small sum paid on account. The question to be decided is, was this act of defendant actionable negligence? In order to answer this question the whole circumstances would have to be taken into consideration and weighed.

In February, 1898, La Banque Jacques Cartier (now La Banque Provinciale) being about to open a branch in Ottawa, the position of local manager was offered to the defendant, a young man, then a clerk in another bank in that city, and accepted by him at a salary of \$1,000 a year. No special representations as to his capacity or qualifications were made, but his local business connections appear to have been considered of consequence.

The breach of instructions in taking the joint note has already been dealt with. The other point which we are now considering, although in a certain sense having its origin in that breach, was not a legal or necessary consequence of it, and must, for the purpose of determining his liability, be treated independently, and on its own merits.

It appears that when Charbonneau discovered the mistake as to the form of the note, he sent for the representatives of the firm which had borrowed the money from the bank. After some discussion it was agreed that the words "jointly and severally" should be inserted in the note, and the change initialed by all the makers. After he had written in the words with this object, it was represented to him, that it was in the interest of the bank not to ask the parties to consent to the alteration at that time, but to await the maturity of the note and have the renewal made out in proper form. Defendant then consulted the solicitor of the bank, who advised him to draw his pen through the added words, and that the note would then be all right. The facts were first made known to the general manager some weeks later when he visited the Ottawa office. He blamed the defendant for not observing his original instructions to get a joint and several note, and charged him to see that the renewal was in proper form. The general manager did not consider that the note had been injuriously affected by what had been done.

In seeking to determine the defendant's liability we must first consider what was his obligation to the bank. This, no doubt, was to exercise reasonable skill, care and diligence in the discharge of his duties. While every one is presumed to know the law and *ignorantia legis neminem excusat*, it has been well said that there is no rule or maxim that every person must be taken to know the legal consequences of his acts. A high degree of skill is usually expected and required of those professional men who hold themselves out as being qualified in their several callings; yet even here the rule is subject to important limitations. In *Jenkins v. Betham*, 15 C.B. 168, it is laid down by Jervis, C.J., that while a valuer of ecclesiastical property might properly be required to know the general rules applicable to the valuation of such property, yet he could not be expected to have a minute and accurate knowledge of the law. And in *Montrion v. Jefferys* (1825), 2 C. & P. 113, at p. 116, where it was sought to hold an attorney liable for a legal blunder, Abbott, C.J., said: "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law."

No doubt the knowledge of the law as to banking and as to bills and notes required of the defendant would be much less than that of a professional man, and in applying to this case the rules and principles above laid down a number of considerations arise and must be duly weighed. The defendant's age, his banking experience (which was known to the bank before his engagement), the ordinary duties of such a local manager, and also the particular circumstances under which he made the alteration in question must all be taken into account. The acquiescence in the proposed change by the interested parties present is also an element. So is the fact that every alteration in a note does not vitiate it. It is only when the alteration is material that such is the result, and it is often a nice question, and one respecting which the courts themselves have not always been consistent, whether a particular alteration is material or not. Here it may fairly be said that it was a debateable question whether a contemplated legitimate alteration which was only partially carried out and which was speedily undone so far as that could be accomplished, and

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which, in that incomplete state, was never sought to be enforced against any party to the note in reality made it void. The solicitor of the bank was of opinion that it did not, and this was also the opinion of the general manager. It is true that this alone might not excuse the defendant; but is it reasonable to require from him in his subordinate position a higher degree of legal knowledge or of skill than that possessed by the legal adviser of the bank or by his superior officer? The question of what was reasonable skill and care was a question of fact to be determined in view of all the circumstances of the case. The learned trial judge who had all the parties before him, who saw and heard them, came to the conclusion that the bank had not made out a case of actionable negligence on this second ground. I do not see any sufficient grounds for disturbing his finding.

A. H. F. L.



## [DIVISIONAL COURT.]

## IN RE O'SHEA.

D. C.

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Sept. 14.

*Will—Construction—Direction to Keep and Maintain.*

A testator directed his sons, to whom he devised his farm, to keep their sisters, until they married, in a suitable manner free of expense, and that so long as they, or either of them, kept house for their brothers, they or she were to have control of the poultry, eggs, butter, etc., and all monies thence derived, for their own use and benefit. The sons were compelled to sell the farm, which was heavily encumbered :—

*Held*, (affirming the decision of Street, J.) that the sons were bound to offer to support and maintain the sisters, either on the farm devised, or in the home of one of them, but that they were not bound to allow them to reside wherever the latter wished, and pay the cost of their maintenance.

THIS was a motion by the executors of the last will of Thomas O'Shea, deceased, for the opinion and direction of the Judge on the following questions, arising under the will, namely, (1) whether under the will the two daughters of the testator, Bridget and Susannah, were entitled to any lien or charge against the lands devised to the testator's two sons William and Dennis for their keep or otherwise; (2) whether if they voluntarily and without any good cause refused to reside on the said land or with their brothers and to be kept and maintained there by them, they are entitled to be paid in money by the executors or by their brothers the cost and expense of their board and maintenance elsewhere.

The will in question was dated July 5th, 1900, and by it the testator devised to his two sons share and share alike his farm and property in the township of Asphodel, bequeathing to them his farm, stock, implements, and other estate, to be possessed share and share alike. The testator proceeded, "I direct my executors or my said two sons to give to their sisters Bridget and Susannah each a cow and proper and sufficient bed and bedding in case of their marriage, and until they marry my said sons are bound to keep them in a suitable manner free of expense, and I direct that so long as they or either of them keep house for their brothers they or she are to have full control of the poultry on the place and of the eggs, also of the butter each year after the factory closes and until same reopens again, all moneys derived from such sources to belong to the said two girls for

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their sole use and benefit share and share alike." It appeared on affidavit that Susannah, shortly after the testator's death, contrary to the wishes of her two brothers, left home and went to Peterborough, where she was in a situation earning about \$4 a week; and that although her brothers had always been and were ready and willing, and offered to keep and maintain her on the land devised, she refused to live there with them.

The motion was argued before STREET, J., in Chambers, on January 30th, 1903.

*G. Edmison*, K.C., for the executors and beneficiaries, except S. O'Shea, contended that it was a sufficient compliance with the will if the two sons offered a home to their sisters either on the farm or elsewhere; but that they were not bound to furnish them with money to enable them to live elsewhere.

*R. R. Hall*, for Susannah O'Shea, supported the opposite contention.

No authorities were cited on the argument.

*Per Curiam.* The will does not require the two sons of the testator to support their sisters unless the latter remains with them.

Susannah O'Shea appealed to the Divisional Court, and the appeal was heard on March 9th, 1903, before MEREDITH, C.J.C.P., and MACLAREN, J.A.

*E. H. D. Hall*, for the appellant, contended that she was entitled to a charge on the lands devised for her support, wherever she might choose to reside: *Millette v. Sabourin* (1886), 12 O.R. 248; *Swainson v. Bentley* (1882), 4 O.R. 572; *DeCrespigny v. DeCrespigny* (1853), 9 Exch. 192; and that in any view she and her sister were not bound to live anywhere else than on the farm.

*G. Edmison*, K.C., for the respondents.

September 14. MEREDITH, C.J., delivered the judgment of the Court:—This is an appeal by Susannah O'Shea from an

order made by Street, J., on January 30th, 1903, on an application by the executors of the will of Thomas O'Shea, under Consolidated Rule 938, for a determination as to the rights of the appellant under the will.

The provisions of the will, as far as they affect the question to be decided, are as follows: [setting them out].

At the time of the death of the testator he was a farmer residing on a farm in the county of Peterborough, which he devised to his sons William and Dennis.

The farm was heavily encumbered at the time of the testator's death, and his sons to whom it was devised were forced to sell and did sell it and removed to the town of Peterborough, where they have since resided.

They have always been willing to provide for the appellant a home with them, and to support and maintain her there, and there is nothing to shew that it is not a suitable home for her, having regard to her station in life, but she contends that she may reside where she chooses and that her brothers are bound to pay her a sufficient sum to enable her to maintain herself.

My brother Street determined against the contention of the appellant, and made the order now in appeal, by which it was declared that "upon the true construction of the last will and testament of the late Thomas O'Shea, deceased, his two sons, the said William O'Shea and Dennis O'Shea, will comply with the direction of the said testator, if they the said William O'Shea and Dennis O'Shea offer to support and maintain Susannah O'Shea and Bridget O'Shea free of expense in a suitable manner, either on the farm mentioned in the will or in the home of the said William O'Shea and Dennis O'Shea situate elsewhere, and in that case they the said William O'Shea and Dennis O'Shea shall have sufficiently complied with the said will."

The order was, in my opinion, rightly made.

The use of the words "keep them" and the provision as to the appellant and her sister keeping house for their brothers indicate, I think, that the testator intended that they should live with their brothers and that he did not mean that they might reside where they wished, and that the brothers should pay the cost of their maintenance. The burden of maintaining

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them in this way would press much more heavily on the brothers than would the maintaining of their sisters with them, and it is highly improbable that the testator intended to impose upon the brothers the greater burden which was one that would probably have consumed the larger part of the income of the farm, even if that income were not reduced by the interest on the incumbrances which they had to pay.

In my opinion provisions of this nature, unless the language of the will imperatively demands it, should not be held to require the beneficiary upon whom the burden is cast to do what the appellant contends it is incumbent on her brothers to do for her. To hold that such a provision as in question casts upon the person who is charged with the obligation such a burden as the appellant contends for, I venture to think, in the case of the wills of most farmers in this country, would be to impose a burden much greater than the testator contemplated should be borne.

Reliance was placed by the appellant's counsel upon the provision as to the sisters keeping house for their brothers, as shewing that it was intended that the sisters should be at liberty to live with their brothers or not, as they saw fit; but I do not view it in that way, and what the testator meant by that provision was, I think, this: He had not imposed and did not intend to impose on his daughters the duty of keeping house for their brothers, but left them at liberty to do so or not as they saw fit; if they did they were to be entitled to the money derived from the sales of the poultry, eggs and butter; if they did not they were not to be entitled to it.

The appeal, in my opinion, fails, and should be dismissed with costs.

A. H. F. L.



[IN THE COURT OF APPEAL.]

LAISHLEY V. GOOLD BICYCLE COMPANY.

*Damages—Future Commissions—Master and Servant.*

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The plaintiff was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause, sales to a large amount having up to that time been effected by him:—

*Held*, that in estimating the damages to which he was entitled the commission on sales which there was reasonable ground to think might have been effected during the unexpired portion of the term, should be taken into consideration.

Judgment of Ferguson, J., 4 O.L.R. 350, reversed.

AN appeal by the plaintiff from the judgment of FERGUSON<sup>J.</sup>, reported 4 O.L.R. 350, was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 4th, 5th, and 6th of May, 1903.

The action was brought to recover damages for wrongful dismissal, and the facts are stated in the report below and in the judgment in this Court. The plaintiff was employed as the defendants' selling agent, and was entitled to a fixed salary and a commission on sales, and the main question in the appeal was whether in estimating the damages to which the plaintiff was entitled an allowance should be made for commission on prospective sales.

*Watson*, K.C., and *R. D. Moorhead*, for the appellant. The learned Judge in the Court below was wrong in holding that no allowance should be made in respect of commission upon the prospective sales. The amount of the prospective sales, while necessarily to some extent uncertain, can be estimated within a reasonable limit and commission on the estimated amount should be allowed. The fact that it is difficult to estimate the damages accurately is no answer to the claim. There was an engagement for a definite term. The remuneration received during the expired portion of that term forms a safe guide upon which to base the allowance for the unexpired portion. Claims of this kind must be based to a great extent on estimates and probabilities, but on the evidence before the Court it

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is plain that after making allowance for the uncertainties of the business a very substantial amount would have been earned by the plaintiff if he had been allowed to carry on the business for the unexpired term of his engagement. The American cases relied upon in the judgment below do, it is true, contain some very wide expressions of opinion as to damages of this kind being too conjectural and uncertain to be allowed, but it will be found on examining these cases that in them there were no data such as exist here upon which to enable a reasonably safe calculation to be made. There are other cases in the American Courts of at least equal authority in which allowances of the kind now contended for have been made. See, for example, *Taylor v. Bradley* (1868), 39 N.Y. 129; *Wakeman v. Wheeler & Wilson Manufacturing Co.* (1886), 101 N.Y. 205; *Dart v. Laimbeer* (1887), 107 N.Y. 664; *Loud v. Campbell* (1872), 26 Mich. 239; *Chapman v. Kirby* (1868), 49 Ill. 211; *Dennis v. Maxfield* (1865), 10 Allen 138; *Blair v. Laflin* (1879), 127 Mass. 518. And the case is quite within the rule recognized by our own Courts and the English authorities. See Mayne's Law of Damages, 6th ed., p. 55; *Faulkner v. Cooper* (1899), 4 Com. Cas. 213; *In re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L.J. Ch. 476; *Ex parte Maclure* (1870), L.R. 5 Ch. 737; *Jameson v. Midland R. W. Co.* (1884), 50 L.T.N.S. 426.

*Wallace Nesbitt*, K.C., and *H. S. Osler*, K.C., for the respondents. The appellant's counsel are mistaken in the interpretation they wish to put upon the judgment appealed from. That judgment does not proceed upon the assumption that in a proper case an allowance for prospective profits or prospective commission should not be allowed, but it turns upon the finding of the learned Judge that in this particular case there is no evidence that any commission could reasonably have been expected to be earned. The evidence shews that the business was in a very unsettled and unsatisfactory condition. The outlook was most doubtful and it was impossible to form any estimate of what the probable sales for the unexpired term of the plaintiff's engagement would be. The sales during the expired term of that engagement do not form a safe basis. It is not like an engagement to sell a staple article. The demand was capricious

and liable to cease at any moment. The plaintiff had no control over the business and no right to insist on the business being carried on. He had a right to a defined salary, but could claim commission only on sales actually effected, and there is nothing in the agreement to compel the defendants to allow sales to be made at any time, at any price, and on any terms the plaintiff might see fit to adopt. See *Rhodes v. Forwood* (1876), 1 App. Cas. 256; *Turner v. Goldsmith*, [1891] 1 Q.B. 544; *Nickoll & Knight v. Ashton Edridge & Co.*, [1901] 2 K.B. 126.

*Watson*, in reply.

September 14. The judgment of the Court was delivered by GARROW, J.A.:—This is an appeal by the plaintiff against the judgment of Ferguson, J., who tried the action without a jury and dismissed it with costs.

The action is brought upon a contract in writing, dated the 23rd of December, 1897, made between the plaintiff and the defendants, the material provisions of which are as follows:—The defendants thereby employed the plaintiff as manager of the defendants' business (which was that of manufacturing and selling bicycles), and particularly of the sales and collection department of the defendants' business, to be carried on in a certain limited and specified territory within the Provinces of Manitoba, Ontario, Quebec, Nova Scotia, and New Brunswick, with the option to the defendants at the end of the first year to extend the territory over which the plaintiff was to act so as to include the whole Dominion, an option afterwards duly exercised.

The term of employment was to be for three years from the 1st of January, 1898; the defendants agreed not to sell or assign any bicycles to any person except the plaintiff, to be brought into the said territory for sale; the plaintiff agreed to organize the defendants' business throughout the whole of the said territory, and in so doing and in carrying on the same after organization was to adopt and maintain the system employed by the Singer Manufacturing Company, with such modifications thereof from time to time as might be in the interests of the defendants; the plaintiff was to select and

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appoint the necessary agents, etc., throughout the said territory and arrange salaries, with power to dismiss and re-appoint such agents, etc.; he was to travel throughout said territory from time to time and exercise personal supervision over the whole territory and the persons in the employment of the defendants, and to devote his whole time and attention to the business of the defendants, except two weeks in each year for a holiday. The plaintiff's headquarters were to be at the city of Toronto, subject to removal at the end of the first year, at the option of the defendants, to the city of Brantford, where the defendants' factory was situated. The business at Toronto and elsewhere throughout the said territory was to be transacted in the name of the defendants; remittances from customers were to be made to the defendants in their name to the office at Toronto under plaintiff's management until the removal to Brantford, and out of the moneys received the plaintiff was to pay expenses, and he was to remit the balance to the defendants by depositing such balance in a chartered bank at Toronto to the defendants' credit. The plaintiff's remuneration was to be, first, a salary of \$20 per week; second, a commission of five per cent. on the net cash remittances from time to time made by the plaintiff to the defendants as thereinbefore provided; and, third, a premium of fifty cents on each bicycle sold or leased within the said territory during the said term; and all his travelling expenses were to be paid by the defendants. But in case of the defendants exercising the option to extend the territory (as they did) the plaintiff's remuneration was to be three per cent. instead of five per cent. upon net remittances, and no premium on bicycles sold or leased. The plaintiff's remuneration was to be paid weekly, and might be deducted by him out of the defendants' money in his hands. The defendants agreed to supply to the Goold Bicycle Company, Limited, Toronto, (*i.e.*, the Toronto office under the plaintiff's management) bicycles and parts thereof sufficient from time to time to fill the orders obtained by the plaintiff and the other employees of the defendants, within the said territory, unless the defendants were prevented from so doing by strikes or accidents, or other causes entirely beyond the defendants' control. The contract contained no provision for the determination by either party of the employment during the said term of three years.



The plaintiff entered upon the employment and remained therein until the 17th of November, 1899, when he was dismissed by the defendants. The only reason assigned for the dismissal was that the defendants had sold their business, and for this reason did not require the plaintiff's services any longer. The sale by the defendants of their business was made in the form of an amalgamation or combination with four other companies, the new company taking over the factories and other assets of the defendants, except the outstanding book debts, etc., and in the new company so formed the plaintiff was upon his dismissal by the defendants at once employed at a fixed salary of \$3,000 per annum. Ferguson, J., found all the facts, properly I think, in favour of the plaintiff. He held that the plaintiff was entitled to the \$20 per week for the full period of three years, and to the commission of three per cent. upon the amounts in respect of sales made in the year 1899, but he disallowed the plaintiff's claim for damages in respect of the amounts payable as commission which he would presumably have received from the sales after his dismissal down to the end of the term, and in his judgment uses this language with reference to such last mentioned claim: "This claim seems to be founded upon conjecture. It is purely speculative, and the evidence in support of it is too uncertain," and refers to the following authorities as correctly stating the law as to such a claim: *Washburn v. Hubbard* (1872), 6 Lans. 11; *Union Refining Co. v. Barton* (1884), 77 Ala. 148; *Brigham v. Carlisle* (1884), 78 Ala. 243, and *Beck v. West & Co.* (1888), 87 Ala. 213, and concludes his review of the authorities thus: "I may here say that in searching I have found a very considerable number of cases in the States of the United States the decisions in which are in the same lines as the cases above alluded to. These seem to me to be more immediately applicable to the present case than the English cases referred to on the argument on account of their facts more closely resembling the facts in the present case. I have, however, read and carefully considered all the cases referred to by counsel, as well as those referred to above, and I have arrived at the conclusion that the plaintiff has not proved by proper evidence the damages that he claims as loss of commission, etc., on sales that

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might have been effected during the period of his employment and after his dismissal from employment, the evidence being too conjectural, speculative, and uncertain."

I am, with deference, unable to agree with the conclusion of the learned Judge disallowing all damages in respect of the commission on prospective sales during the balance of the term.

By the terms of the contract the plaintiff was bound to serve for three years. He had served for almost two-thirds of the period, and his earnings in commissions during the actual service are proved, and amount to a large sum, so large indeed as to clearly shew that from that source, and not from his fixed salary of \$20 per week, he was to derive the chief consideration on his part for entering into the contract. This is also indirectly shewn by the fact that immediately after his dismissal he was employed by the new company at the large fixed salary of \$3,000. It would be at least an illogical result to hold the defendants liable for the \$20 per week and to relieve them from a much larger sum in commissions, a result to be struggled against, in my opinion, as not merely illogical but wholly unjust to the plaintiff.

The breach is clear, and admitted, and the only reason, apparently, for not permitting the ordinary consequences of adequate damages being adjudged to the plaintiff is because such damages are, it is said, too vague and conjectural, which is the question to be determined on this appeal. Damages very seldom are capable of exact calculation, and yet I think many cases can be found in which damages have been awarded where the basis for a calculation was less certain than in this case. To begin with, there is the undisputed fact of the plaintiff's past earnings from commissions in 1898 and 1899; certainly some evidence of what he would probably have earned in 1900; and, indeed, in my opinion, strong evidence, unless affected by counter evidence on the part of the defendants to shew that these past earnings were abnormal, or that the business had depreciated or come to an end. But we have here not merely the past earnings but the fact that the bicycle business was continued under the new company after the plaintiff's dismissal during the year 1900, but with, it is said, a diminished market. The manager for the new company puts this depreciation at

about forty per cent. of the previous year's demand; and another witness called by the defendants at about fifty per cent. Giving credit to these witnesses, it appears to me that there is proper and even sufficient material for a reasonably correct calculation of the amount of the damages in question to which the plaintiff is entitled, having regard, of course, to what the situation and outlook were at the time of the breach in November, 1899, and these damages I would fix, after making all just deductions, at \$1,000, for which he should, in my opinion, have judgment.

There are in the American cases relied on by the learned Judge at the trial, all of which I have carefully perused, doubtless expressions of opinion which in themselves, and as applied to the facts in this case, would uphold his conclusion as correct.

On the other hand, I find authoritative decisions in the English reports, which, it appears to me, in their facts are practically identical with the facts in the present case, in which the plaintiff's legal right to recover is established. In *Rhodes v. Forwood*, 1 App. Cas. 256, in the House of Lords, the facts were that the defendants, coal mine owners, agreed with the plaintiff for a fixed period of seven years to be their sole agent for the sale of coal at Liverpool, to be paid by commission on his sales. The defendants there, as here, sold out their business about the middle of the term. The plaintiff brought an action for damages for ceasing to employ him, and was defeated *because there was no express agreement to employ him for the full term, and the Court held that it ought not to imply such an agreement*. If in the agreement there in question there had been an express stipulation to furnish the goods, such as there is in the present case, it is quite clear that the plaintiff would have recovered. In *Turner v. Goldsmith*, [1891] 1 Q.B. 544, the defendant agreed to employ the plaintiff as agent, canvasser, and traveller, for a fixed term of five years at least, to sell the various articles manufactured or sold by the defendant, a shirt manufacturer. At the end of about two years the defendant's factory was burnt and he thereupon ceased to employ the plaintiff, who sued for damages for breach of the agreement, and the Court of Appeal held him entitled to recover substan-

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tial damages, the head note stating as the reason, "For the defendant, having agreed to employ the plaintiff for five years, did not fulfil that agreement unless he sent him a reasonable amount of samples to enable him to earn his commission." The facts in these two cases of undoubted authority seem to me to be much nearer the present case than the facts in the New York and Alabama cases before referred to; and in both the English cases it would have been a short and easy answer to the plaintiffs' claims to have said that commissions on future prospective sales were too conjectural and speculative to be entertained. See also to the same effect the recent case of *Ogdens, Limited, v. Nelson*, [1903] 2 K.B. 287.

But these American decisions do not, I think, represent a general rule of decision recognized even in the United States.

For instance, in a work often referred to and cited, *The American and English Encyclopædia of Law*, 2nd ed., vol. 20, p. 39, I find this summary of the law under the head of "Master and Servant—Where damages consist of profits lost": "Where the contract has been wrongfully terminated by the master, and the resultant damages, if any, consist in profits lost, such profits are the proper measure of damages, and are recoverable if the evidence furnishes reasonable data upon which to base them. *If, however, the employee has never performed any service under the contract*, and there is no proof upon which such profits can be estimated, they are deemed too remote and speculative to constitute the basis of a recovery," which seems to me to be a fairly accurate working definition, although much must always depend upon the nature of the contract and the facts appearing in each particular case.

Upon the whole, I am of the opinion that the plaintiff's appeal should be allowed with costs, and that he is entitled to judgment against the defendants for \$1,000, and the costs of the action.

R. S. C.



## [IN THE COURT OF APPEAL.]

EARLE ET AL. V. BURLAND ET AL.

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*Interest—Moneys of Company Improperly Withdrawn—President and Manager  
—Trustee—Statute of Limitations—Reference—Powers of Master.*

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The appellant, who was for many years the president and general manager as well as the principal shareholder of an incorporated company, withdrew from the funds of the company, between the 1st August, 1889, and December, 1900, at the rate of \$5,025 per annum, as salary in addition to his regular salary. He assumed to do this under a resolution authorizing the payment of extra remuneration to the "staff," but it was held by the Court of Appeal (27 A.R. 540), and by the Judicial Committee ([1902] A.C. 83), that the resolution did not apply to him, and he was ordered to account for the moneys received during the whole period, notwithstanding a plea of the Statute of Limitations:—

*Held*, that his position was that of a trustee for the company, and that he was chargeable with interest on the moneys received.

*In re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519, followed.

*Held*, also, that the Master upon a reference had power under Con. Rules 666 and 667 to charge the appellant with interest, although the judgment directing the reference was silent on the subject.

Judgment of Meredith, C.J.C.P., affirmed.

By the judgment of the Judicial Committee of the Privy Council, reported [1902] A.C. 83, the judgment of the Court of Appeal for Ontario, 27 A.R. 540, was in part reversed, but affirmed as regards the direction that the defendant George B. Burland should repay to the defendant company moneys improperly withdrawn on account of salary, in excess of \$12,000 per annum, since the 24th April, 1888.

The local Master at Ottawa, to whom a reference had been directed, by his report, dated 11th April, 1902, reported (paragraph 6) that the defendant George B. Burland had, since the 24th April, 1888, withdrawn from the defendant company as salary, in excess of \$12,000 per annum, the total sum of \$58,556.25; and (paragraph 7) that, at the request of the plaintiffs, he found that the interest, at six per cent. per annum, on \$58,556.25, from the 24th April, 1888, to the date of the report, was the sum of \$22,540.67.

The plaintiffs moved to vary the report by adding to the amount found due the sum calculated for interest, and for judgment on the report as so varied.

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The motion was heard by MEREDITH, C.J.C.P., at the Ottawa Weekly Court, on the 16th June, 1902.

*F. H. Chrysler*, K.C., for the plaintiffs.

*W. D. Hogg*, K.C., for the defendants.

July 17. MEREDITH, C. J.:—Motion for judgment on further directions and as to subsequent costs reserved by the judgment pronounced at the trial as varied by the Court of Appeal and the Judicial Committee of the Privy Council.

The only question in controversy is whether the defendant George B. Burland should be charged with interest on the sums which the local Master at Ottawa has, by his report of the 11th April, 1902, found him liable to account for and pay over to the defendant company under the reference directed by the 7th paragraph of the judgment.

It is in accordance with the practice of the Court in a proper case to award interest against an accounting party on further consideration, although the question has not been reserved by the original judgment: Daniell's Chancery Practice, 7th ed., p. 950, and cases there cited, one of which is also reported as *Creuze v. Hunter* (1793), in 2 Ves. Jr. 157. That this is a proper case in which to direct the payment of interest by the defendant Burland does not, I think, admit of doubt. The moneys with which he has been charged were, as the judgment determined, illegally withdrawn by him from the assets of the defendant company under his control as trustee or quasi-trustee for it, and were applied by him to his own use and in such a case the liability to pay interest is, I think, a clear one.

If it were the case of an accounting party who had failed on technical grounds to establish a fair claim, made under the honest misapprehension of legal rights, it would be proper not to fix him with liability for interest on the moneys retained, but this is not the case, for the defendant Burland, as I understand the judgment of the Court of Appeal, had neither authority to retain the money with which he has been charged nor reason to entertain the belief that he had authority to retain it.

There will, therefore, be added to the amount with which the local Master has found the defendant George B. Burland to

be chargeable, the sum mentioned in the 7th paragraph of his report as the interest upon it, and there will be judgment directing the defendant George B. Burland to pay the whole to the defendant company, and he must also pay the subsequent costs reserved by the judgment.

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The defendant G. B. Burland appealed to the Court of Appeal from this decision, and his appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, and GARROW, JJ.A., on the 20th May, 1903.

*W. D. Hogg*, K.C., and *G. F. Shepley*, K.C., for the appellant. Neither the Master nor the Court below on appeal from the report and on further directions had the right to award interest. The question of interest was finally pronounced upon and settled by the judgment of this Court, 27 A.R. 540, affirmed on that point by the Judicial Committee, [1902] A.C. 83. The judgment against the appellant for a refund of the amounts paid to him for salary proceeded on the ground of mistake of fact. It is not a case in respect of which "in law" interest would be properly chargeable, and there is no contract, express or implied, for the payment of interest: *In re Gosman* (1881), 17 Ch. D. 771; *Caledonia R. W. Co. v. Carmichael* (1870), L.R. 2 H.L. (Sc.) 56, 66. The case does not come under sec. 114 of the Judicature Act, as the amount is not payable by virtue of a written instrument at a certain time, nor was any demand in writing ever made upon the appellant; indeed, even in the statement of claim no demand was made for interest on these amounts. See *McCullough v. Clemow* (1895), 26 O.R. 467. It is not a case in which a jury would allow interest, under sec. 113 of the same Act: see *McCullough v. Clemow*, 26 O.R. 467; *Webster v. British Empire Mutual Life Assurance Co.* (1880), 15 Ch.D. 169; *London, Chatham, and Dover R. W. Co. v. South Eastern R. W. Co.*, [1892] 1 Ch. 120, [1893] A.C. 429. The payments having been made by the company to the appellant under a mistaken interpretation of the resolution, and there being no evidence that the appellant had invested the amounts at interest, interest is not chargeable against him upon his being called on to return the amounts: *Barber v. Clark* (1891), 20 O.R. 522; *Jervis v. Wolferstan* (1874), L.R. 18

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Eq. 18, 27. Upon a hearing on further directions, no direction will be given for the computation and payment of interest, where the question of interest has not been reserved by the judgment: *Ryves v. Coleman* (1742), 2 Atk. 440; *Phillips v. Homfray*, [1892] 1 Ch. 465; *Champ v. Moody* (1752), 2 Ves. Sr. 470; *Herle v. Greenbank* (1763), 1 Dick. 370. The Master did not find that the appellant should pay interest on these amounts. It is only in cases where it appears from the report that there is an equitable right to charge an accounting party with interest that the Court will direct the computation and payment of interest when it has not been reserved by the original decree: *Parnell v. Price* (1808), 14 Ves. 502; Leggo's Chy. Prac., p. 877; Daniell's Chy. Prac., 7th ed., p. 950; *Curling v. Austin* (1862), 2 Dr. & Sm. 129. The cases in which the Court, on further directions, has ordered the payment of interest where the question of interest is not reserved by the judgment, are cases of defaulting executors, trustees, or agents: see *Sammes v. Rickman* (1792), 2 Ves. Jr. 36; *Hollingsworth v. Shakeshaft* (1851), 14 Beav. 492; *Johnson v. Prendergast* (1860), 28 Beav. 480; *Pearse v. Green* (1819), 1 J. & W. 135, 140. The appellant did not occupy the position of trustee or agent of the company; at most he became liable to account for money received by him in good faith under a mistake of fact. The claim for interest is a new claim raised for the first time upon the motion for judgment on further directions. If interest is allowed at all, it should be for six years only. The appellant has pleaded the Statute of Limitations.

*A. H. Marsh*, K.C., and *C. J. R. Bethune*, for the plaintiffs. The payments to the appellant amounted to a wrongful conversion of the company's funds by the appellant, and a debt due the company for a liquidated amount was created by each payment. The money was that of the company, illegally taken from the company, which the appellant had the power to take in consequence of the fiduciary position which he held as president and general manager. Each withdrawal was a breach of trust, and the obligation to pay interest follows: *Moons v. De Bernales* (1826), 1 Russ. 301; *Bick v. Motly* (1835), 2 My. & K. 312. Interest is recoverable for the conversion of money upon a breach of trust: *Dreyfus v. Peruvian Guano Co.*



(1889), 42 Ch.D. 66, [1892] A.C. 166. Section 113 of the Judicature Act is taken from sec. 28 of 3 & 4 Vict. ch. 42 (Imp), but the latter does not contain the words "or in which it has been usual for a jury to allow it." See sec. 29 of the Imperial Act; 7 Wm. IV. ch. 3, sec. 30 (U.C.); Holmsted & Langton's Judicature Act and Rules, p. 147; *Smart v. Niagara and Detroit Rivers R. W. Co.* (1862), 12 C.P. 404; *Spence v. Hector* (1865), 24 U.C.R. 277, 281, 282; *Michie v. Reynolds* (1865), *ib.* 303; *McCullough v. Clemow*, 26 O.R. 467. The case law in England on the subject of interest differs from our own: *McCullough v. Newlove* (1896), 27 O.R. 627, at p. 630. The English cases cited by the appellant do not apply. This is a case in which the liability to pay interest arises: *Inglis v. Beaty* (1878), 2 A.R. 453; *In re Evans*, W.N. 1876, p. 205; *Uffner v. Lewis* (1903), 5 O.L.R. 684. A party may be charged with interest at the hearing on further directions, although the question has not been reserved by the original judgment: Daniell's Chy. Prac., 7th ed., p. 950; *Sammes v. Rickman*, 2 Ves. Jr. 36; *Creuze v. Hunter*, 2 Ves. Jr. 157, 164; *Flintoff v. Haynes* (1845), 4 Ha. 309; *Hollingsworth v. Shakeshaft*, 14 Beav. 492, 497; *Johnson v. Prendergast*, 28 Beav. 480. Agents are upon the same footing as trustees as to interest upon balances: *Hardwicke v. Vernon* (1808), 14 Ves. 504; *Mayor, etc., of Berwick-on-Tweed v. Murray* (1856), 7 De G. M. & G. 497, 519; *Pearse v. Green*, 1 J. & W. 135. The Statute of Limitations does not apply to the claim for interest. An agent who has received for his own use the money of his principal cannot set up the Statute of Limitations in bar of an action for an account: *Burdick v. Garrick* (1870), L.R. 5 Ch. 233. The statute will not bar the recovery of interest if there is no bar as to the principal: *Grafton Bank v. Doe* (1847), 19 Vt. 463; *De Cordova v. City of Galveston* (1849), 4 Tex. 470.

September 14. The judgment of the Court was delivered by Moss, C.J.O.:—Appeal by the defendant George B. Burland from the judgment of Meredith, C.J., upon an appeal from the report of the Master at Ottawa, and on hearing on further directions.

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The ground of appeal is, that the learned Chief Justice erroneously determined that the appellant was chargeable with interest upon a sum of \$58,556.25, which the Master, upon taking the accounts directed to be taken by him, found to be due by the appellant in respect of sums withdrawn by him from the British American Bank Note Company as salary, in excess of the salary to which he was entitled as general manager.

The appellant has been for many years the president and general manager of, as well as the principal shareholder in, the company. On the 24th April, 1888, a resolution was, at his instance, passed by the board of directors, providing for an increase of salary to the "staff" equal to 5 per cent. on the capital stock held by each of them. The reason of this was, that it was in contemplation to remove the operative part of the business from Montreal to Ottawa, and some of the employees made representations as to the difficulties and expense to them arising out of the removal. And by the resolution it was left with the appellant to make the best arrangements he could with reference to the assistance to be given the employees.

Commencing with the 1st August, 1889, and thenceforward until December, 1900 (a period of over 11 years), the appellant withdrew from the company at the rate of \$5,025 per annum, as salary, in addition to \$12,000 per annum to which he was entitled. And he claimed to be entitled to the benefit of the resolution as one of the staff.

By the judgment of this Court, affirmed in this respect by the Judicial Committee of the Privy Council, it was held that the resolution was never intended to apply to the appellant, and it was declared that the appellant was liable to account for all sums so withdrawn, and it was referred to the Master to take an account of what was due from the appellant upon that and other accounts.

The appellant admitted having withdrawn altogether \$58,556.25, and with this sum he was charged by the Master. The Master was requested to charge the appellant with interest, but declined to do so, and, at the plaintiffs' request, ascertained the amount of interest, and reported the same at the sum of \$22,540.67.

Upon appeal and hearing on further directions, Meredith C.J., held the appellant chargeable with the interest.

We think the judgment is right and that it should be affirmed.

As regards these moneys, the appellant's position was and is that of trustee for the company. His position is the same or similar to that of the appellants in the case *In re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch.D. 519.

The case is even stronger against the appellant than in the case cited, for there the appellants had paid away to others a great portion of the moneys of the company, which were sought to be recovered back, while here the sums were withdrawn and retained by the appellant for his own use.

Yet in *Flitcroft's* case the appellants were held liable as trustees, and were ordered to repay the amount with interest. And, on the ground that they were trustees, it was held that the Statutes of Limitation did not apply.

Here, notwithstanding his plea of the Statutes of Limitation, the appellant has been held liable to repay moneys received in and since the year 1889, more than 6 years before action, and this could have been upon no other ground than that he is a trustee.

That being so, there is no reason for relieving him from the payment of interest.

There is no valid justification for his act in withdrawing the moneys from the company's funds and appropriating them to his own use.

His position in the company required that he should exercise a careful supervision over the payments to be made to members of the staff under the resolution, and it is plain from the circumstances leading to the passing of it and the reasons why it was called for, as well as from the language itself, that it was only intended to apply to employees under him who were to be under the necessity of removing to Ottawa. The appellant does not pretend that he was to remove or that he did remove to Ottawa, and, as held by this Court and the Judicial Committee, it was not intended to include him. If it was not intended to include him, no person could have been better aware of it than he was, and there was nothing to warrant him in putting such

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an interpretation upon it. The case is one in which the ordinary rule of requiring restitution of trust funds with interest should be enforced.

Under the terms of the reference and the wide powers conferred upon the Master by Consolidated Rules 666 and 667, he had full power and jurisdiction to charge the appellant with interest. By Rule 666 it is expressly provided that, in order to enable the Master to exercise the powers conferred upon him by the following Rules, it is not necessary that the judgment or order of reference should contain any specific direction in respect thereof. The silence of the judgment upon the subject of interest is therefore no reason for not charging it. On the contrary, the Master is bound to proceed under the Rules unless there is something in the judgment or order of reference expressly limiting his powers in the particular case.

There is nothing of the kind in this case.

Even if the Master was not empowered to deal with the question, it was competent for the Court to deal with it on further directions.

The reasons stated by the learned Chief Justice and the authorities cited by him fully support his judgment.

The appeal is dismissed with costs.

If the appellant were not within the rule as to trustees, he would still be liable for interest from the date of the commencement of the action.

There was then a demand for restitution of the moneys withdrawn, but he wrongfully and without title retained them, and has not yet restored them.

T. T. R.

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## [IN THE COURT OF APPEAL.]

## CITY OF TORONTO V. BELL TELEPHONE CO. OF CANADA.

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*Constitutional Law — Telephone Company — Work or Undertaking Connecting Provinces—Jurisdiction of Dominion Parliament—B.N.A. Act, sec. 91 (29), sec. 92 (10a)—Right to Construct Lines in Streets—Effect of Provincial Act.*

The work or undertaking for the prosecution of which the defendants were incorporated by 43 Vict. ch. 67 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces, or extending beyond the limits of the Province, within the meaning of the exception *a.* in clause 10 of sec. 92 of the British North America Act, and therefore falls within the exclusive legislative authority of the Parliament of Canada, under clause 29 of sec. 91.

The powers conferred by the defendants' Act of incorporation, as amended by 45 Vict. ch. 95 (D.), are not curtailed by the provisions of 45 Vict. ch. 71 (O.), as regards the right to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisos set forth and contained in sec. 3 of the Act of incorporation as amended; MACLENNAN, J.A., dissenting.

Judgment of Street, J., 3 O.L.R. 465, reversed.

APPEAL by the defendants from the judgment of Street, J., 3 O.L.R. 465, upon a special case, declaring that the defendants had no right to carry any poles or any wires (whether such wires were above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on the 17th November, 1902.

*W. Cassels*, K.C., and *G. Lynch-Staunton*, K.C. (with them *S. G. Wood*), for the appellants. The two questions raised by the appeal are whether the view of the British North America Act taken by Street, J., is right, and whether his view of the effect of the Provincial statute is right. He holds that unless the Dominion Parliament makes it obligatory to lay lines in more than one Province, the Dominion cannot give powers of expropriation; the Dominion legislation cannot be made operative unless there is work physically on the ground. That is the crux of the judgment. The point was determined the other way in *Colonial Building and Investment Association v. Attorney-General of Quebec* (1883), 9 App. Cas. 157. As to

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the construction of the statute, see *City of Montreal v. Standard Light and Power Co.*, [1897] A.C. 527. The Dominion Parliament has the jurisdiction to incorporate companies and therefore to give them necessary powers of expropriation: *Cushing v. Dupuy* (1880), 5 App. Cas. 409; *Citizens' Ins. Co. v. Parsons* (1881), 7 App. Cas. 96, 117; *Tennant v. Union Bank of Canada*, [1894] A.C. 31. The case falls under sec. 91 of the British North America Act. If the Provincial Act is to be construed as curtailing the powers conferred by the Dominion Act, it is *ultra vires*. See *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455; *Madden v. Nelson and Fort Sheppard R. W. Co.*, [1899] A.C. 626, 628; *Canadian Pacific R. W. Co. v. Notre-Dame*, *ib.* 367. As to the construction of the Provincial Act, there is practically no difference between the two. Unless the word "such" in sec. 3 of the Provincial Act refers to poles over 40 feet, the provision is superfluous. The object of the Act was not to take away any powers which the company had. The golden rule of construction (Beale, p. 40) is to take the common grammatical meaning of words unless the result is ridiculous or repugnant. See *Grand Trunk R. W. Co. v. Washington*, [1899] A.C. 275.

*C. Robinson*, K.C., and *J. S. Fullerton*, K.C., for the plaintiffs, respondents. The Dominion Parliament cannot repeal Provincial legislation, nor *vice versâ*: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348. In *Citizens' Ins. Co. v. Parsons*, 7 App. Cas. 96, the Provincial Act was held to be confined to the Province. It shews that the Dominion Parliament may incorporate a company to carry on business in the different Provinces. A difference may be seen when the objects of incorporation are considered. If a company is incorporated to do a banking business, the Provincial Legislature can do nothing. But if the subject is one over which the Provincial Legislature has jurisdiction, the Dominion Parliament cannot confer powers: Lefroy on Legislative Power in Canada, p. 618, citing the *Parsons* case; Black on Tax Titles, 2nd ed., sec. 14. The power cannot be given unless given expressly. The same result as to the Ontario Act was reached by Wilson, C.J., in *Bell Telephone Co. v. Belleville Electric Light Co.* (1886), 12 O.R. 571, and by Maclellan, J.A.,

in *Atkinson v. City of Chatham* (1899), 26 A.R. 521, 523. As to the meaning of "such," see *Eastern Counties, etc., R.W. Cos. v. Marriage* (1860), 9 H.L.C. 32; Dwaris on Statutes, 2nd ed., p. 601. The powers conferred upon municipalities to regulate and govern their streets and to prevent interference with them should not be held to be overridden except by direct and plain statutory enactment.

*Cassels*, in reply, referred to *Montreal and Ottawa R.W. Co. v. City of Ottawa* (1901-2), 2 O.L.R. 336, 4 O.L.R. 56.

*Cur. adv. vult.*

ARMOUR, C.J.O., was appointed to the Supreme Court of Canada shortly after the hearing; and MOSS, J.A., became Chief Justice of Ontario.

September 14. MOSS, C.J.O.:—Upon the case stated by the parties two questions arise for decision.

The first is whether the work or undertaking for the prosecution of which the defendants were incorporated by the Act 43 Vict. ch. 67 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces or extending beyond the limits of the Province, within the meaning of clause 10 (a) of sec. 92 of the British North America Act.

If this question is answered in the affirmative, then the work or undertaking falls within the exclusive legislative authority of the Parliament of Canada, under clause 29 of sec. 91 of the Act; and thereupon arises the second question, viz., what, if any, effect has the Act 45 Vict. ch. 71 (O.), passed by the Legislature of Ontario at the instance of the defendants, upon the rights conferred upon them by their Act of incorporation, as amended by the Act 45 Vict. ch. 95 (D.)?

Are these rights in any way curtailed or qualified by the provisions of the Ontario Act?

Dealing with the first question, it is important to note the objects and purposes for which incorporation was sought and granted. These are set forth in sec. 3 of the Act 43 Vict. ch. 67 (D.), as amended by the 45 Vict. ch. 95. Those enumerated in the beginning of the section, viz., the manufacture of

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telephones and other apparatus connected therewith and their appurtenances and other instruments used in connection with the business of a telegraph or a telephone company, and such other electrical instruments or plant as the company may deem advisable, and the purchasing, selling, or leasing of the same and rights relating thereto, are not to be considered as other than local. And, if the defendants' purposes and objects were confined to operations of the kind mentioned, there would be no difficulty in saying that incorporation for such purposes might and should properly be sought from the Provincial authority.

But the difficulty is in respect of the other objects and purposes set forth in sec. 3. They are far wider and more extensive in their scope. Power is given to build, establish, construct, purchase, acquire, or lease, and maintain and operate, or sell or let, any line or lines for the transmission of messages by telephone in Canada or elsewhere, and to make connection for the purposes of telephone business with the line or lines of any telegraph or telephone company in Canada or elsewhere, and to aid or advance money to build or work any such line to be used for telephone purposes, with power to borrow money upon the company's bonds for carrying out any of the objects or purposes of the Act. Reading this language of the section, it is difficult to resist the conclusion that it was contemplated and intended that the defendants would extend their operations into more than one Province of the Dominion and probably beyond the Dominion. It is true that they are placed under no compulsion to do so, but it is not unlikely that it was considered that the *fames auri* would be a sufficient incentive to them to avail themselves to the full extent of their powers. Doing so involves the construction or acquisition and operating of telephone lines extending across the boundaries of one Province into another or the uniting with telegraph lines the wires of which cross the boundaries between Provinces. If, as seems to be the case with telegraphs, the wire is a sufficient link of connection between two Provinces, or, at all events, the carrying of a telegraph wire from one Province into another is an extension of the work or undertaking beyond the limits of one



Province, it is difficult to deny the same effect to a telephone wire.

And the conclusion must be that the work or undertaking authorized by sec. 3 of the defendants' Act of incorporation is one falling within clause 10 (a) of sec. 92 of the British North America Act. The question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction. Nor does it affect the validity of an incorporation or the status of the incorporated body as a corporation. As said by the Judicial Committee in *Colonial Building and Investment Association v. Attorney-General for Quebec*, 9 App. Cas. at p. 165, "Surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one Province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with power to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation."

The first question must therefore be answered in the affirmative.

It remains to consider the second question. The argument for the respondents is that, granting the legislative authority to be in the Parliament and not in the Legislature, the defendants, having applied for and obtained legislation from the Legislature, must be held to have consented that in any conflict of the enactments those passed by the Legislature should prevail.

It may well be doubted whether there was any occasion for the Act (45 Vict. ch. 71 (O.)) The general objects and purposes for which the defendants were incorporated being such as came within the legislative authority of Parliament, it was proper that it should confer upon the defendants such general powers

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as were necessary to enable the works or undertaking to be effectually proceeded with; and this was the purpose of sec. 3 of the Act of incorporation. The preamble of the Provincial Act, however, shews that its purpose apparently was to allay doubts in regard to those portions of defendants' work and undertaking which were local and did not extend beyond the limits of this Province. And the legislation was sought as a measure of precaution rather than with the purpose or intention of giving up any powers or rights the defendants were entitled to under their Act of incorporation. Nor is there anything on the face of the legislation to indicate that the defendants had entered into or were making a bargain to that effect. There is nothing there to prevent them from now insisting upon such rights as were given them by the Parliament in respect of matters over which it had undoubted authority. Among these were the rights given by sec. 3 of the Act of incorporation, which enables them, subject to the provisoes and conditions therein and in the amending Act 45 Vict. ch. 95 (D.) contained, to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any public highway or street. These, having been granted in furtherance of objects or purposes properly authorized by the Parliament, could not be impaired by the action of the Provincial Legislature.

Therefore the defendants are entitled to the full benefit of the language of sec. 3 of their Act of incorporation as amended, notwithstanding the Act 45 Vict. ch. 71 (O.)

The result is that the appeal should be allowed, and that, instead of the declaration made by Street, J., it should be declared that the powers conferred by the defendants' Act of incorporation, 43 Vict. ch. 67 (D.), as amended by the Act 45 Vict. ch. 95 (D.), are not curtailed by the provisions of the Act 45 Vict. ch. 71 (O.), as regards the right to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisoes set forth and contained in sec. 3 of the Act of incorporation as amended.

Under the circumstances, there should be no costs of the litigation to either party.

OSLER, J.A., concurred.

GARROW, J.A. :—This is an appeal by the defendants from the judgment of Street, J., reported in 3 O.L.R. 465.

The defendants were incorporated by 43 Vict. ch. 67 (D.), amended by 45 Vict. ch. 95 (D.)

By the Act of incorporation the head office is to be at the city of Toronto or at such other place in Canada as the directors might thereafter determine.

The company is thereby empowered to manufacture telephones, etc., and to purchase, sell, or lease the same, and to build, establish, construct, purchase, acquire, or lease, and maintain and operate or sell or let, any line or lines for the transaction of messages by telephone in Canada or elsewhere, etc., etc. The company may also construct, erect, and maintain its line or lines along the sides of and across or under any public highway, street, bridge, etc., or across or under any navigable waters, either wholly in Canada or dividing Canada from any other country. But in cities, towns, and incorporated villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wire less than 22 feet above the surface of the street, nor carry more than one line of poles along any street, without the consent of the municipal council having jurisdiction over the streets of the said city, town, or incorporated village; and in cities, towns, and incorporated villages the location of the line or lines, and the opening up of the street for the erection of poles, or for carrying the wires under ground, shall be done under the direction and supervision of the engineer or such other officer as the council may appoint, and in such manner as the council may direct. The company is also given power to purchase and lease any telephone line established or to be established in Canada or elsewhere, and power to amalgamate with or lease their line to any other company, etc., with other powers which need not be referred to.

It is not disputed that incorporation was properly obtained from the Dominion Parliament, and not from the local Legislature. The question in dispute is as to which is the proper legislative authority to authorize the construction of the proposed works, where such construction invades, or may invade, Provincial rights of property or civic control, otherwise under the exclusive jurisdiction of the local Legislature.

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This question is to be determined, in my opinion, by a consideration of the nature of the proposed work or undertaking. Is it a work or undertaking which falls under sec. 91 of the British North America Act; or is it one falling within sec. 92 of that statute?

If it falls within sec. 91, the judgment of the learned trial Judge properly, in my opinion, concedes that the Dominion Parliament only would have exclusive jurisdiction, not only to incorporate but to grant the powers required for the construction and establishment of the proposed work, even if in granting such powers there was involved an apparent invasion of matters otherwise within exclusive local jurisdiction. This seems to be the necessary conclusion from the judgment of the Privy Council in *Tennant v. Union Bank of Canada*, [1894] A.C. 31.

But the learned Judge's difficulty apparently was in determining whether the proposed work did actually, before construction, and when the interprovincial connection was necessarily, to use the learned Judge's expression, "on paper" only, fall within sec. 91; whether, in other words, the words "other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province," rendered an actual physical connection necessary before the question of jurisdiction could be determined. With deference, I cannot share the learned Judge's difficulty. It appears to me to be reasonably clear that what he calls a paper connection is all that is necessary, and that any other construction would result not only in a departure from the true intent and meaning of the statute, but might, and very probably would, create a state of intolerable confusion and conflict between the local and Dominion authorities. I am quite unable to see any difference between a telephone line proposed to be constructed from the city of Toronto in the Province of Ontario to the city of Montreal in the Province of Quebec, and a line of railway between the same two points. Both would be interprovincial. Both would originate on paper in the shape of a charter or Act of incorporation, which no one doubts would be properly granted by the Dominion Parliament. The construction of the railway would be regulated by the general Railway Act of the Dominion, or by that Act and such



special powers as the special Act conferred. No local Legislature would have power to limit or control the railway's power of expropriating, or its other powers of construction granted by the Dominion Parliament, and yet the original interprovincial connection in the case of the railway would be found only in its charter. The power of the Dominion Parliament to legislate concerning railways is derived under the same sections, viz., sec. 92, sub-sec. 10 (a), and sec. 91, sub-sec. 29, as would authorize interference with or legislative control over "other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province," such as I think this is, the only difference being that railways, canals, telegraphs, etc., are specifically mentioned. But the moment it appears in the application for a charter or special Act that these other projected works or undertakings will, when constructed, extend beyond the Provincial boundaries, they take their place beside railways, canals, ships, etc., having similar extraprovincial termini, and at once become subjects of exclusive Dominion jurisdiction.

If I am right in this view, it is clear that the defendant company was not only properly incorporated by the Dominion Parliament, but that the powers in question conferred for the purpose of making effective the proposed undertaking in the construction and establishment of a line of telephones to extend beyond the confines of one Province, were within the exclusive competence of the Dominion Parliament. I think, differing in this respect also from the learned trial Judge, that nothing of authority was added by the use in the second Dominion statute, 45 Vict. ch. 95, of the words that the proposed work was for the advantage of Canada. These words were wholly unnecessary, in the view I take, to either confer or to increase a jurisdiction which was already, I think, ample and exclusive. The use of these words is, in my opinion, only applicable in the case of works situated or to be situated, when completed, wholly in one Province, which was not the case with the proposed works in question.

The defendants are not, I think, estopped by their application for the local Act 45 Vict. ch. 71. There is, in the first place, nothing that I can see to indicate that the local

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Legislature intended to limit or curtail the defendants' rights. The recital supports a different intention, viz., one of confirming existing rights, if not of enlarging them; and, at all events, of removing doubts said to have been raised only as to the defendants' powers to deal with purely local lines. Nor is there anything on the surface to suggest that the defendants agreed or intended to agree, or that the local Legislature stipulated for an agreement, that the defendants should renounce any of their rights under Dominion legislation, in consideration of receiving the powers conferred by the local Act.

It must be assumed, I think, that the powers conferred by the Dominion statutes were those which that Parliament thought it proper in the public interest that such a company should possess, and the company could not, even by an express consent, surrender them to the local Legislature: see *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623, at p. 634; *Dobie v. Temporalities Board* (1881-2), 7 App. Cas. 136.

I have some doubt as to whether in fact the provisions of the Ontario statute are in conflict with those of the Dominion. It is not necessary, in the view I have taken, to determine this, but there is certainly something to be said for this, that the control over the *location* of the line given to urban municipalities by the amending Dominion statute, passed only two months after the Act of the Ontario Legislature, and both, it is to be observed, upon the application of the defendants themselves, is about, if not quite, the equivalent of the earlier limitation in the Ontario statute, not to *erect*, etc., without the consent of the council. This provision can never have been intended to enable the council to absolutely prohibit the entry into the city of the defendants' poles and lines, otherwise they could not have even reached their head office, as fixed in their Act of incorporation, without the plaintiffs' consent. This required consent must, I think, be read as a power to regulate, and not to prohibit, and in this way and as to this, the main subject of contention, there is, in my opinion, little, if any, substantial difference between the statutes of the Dominion and the one of Ontario. Under both, the consent of the council is necessary to a *location* of the line, which must be located somewhere, and in the locating of which the parties must of course act

reasonably—but the statutes require action, and not merely a refusal to act.

I think both parties are in some degree excessive in their claims; the plaintiffs in claiming a power to withhold entirely their consent, and the defendants in claiming that they are empowered to choose the streets, and in confining, or seeking to confine, the plaintiffs' power of oversight simply to shewing where the poles may be placed on a street so chosen.

With a declaration to give effect to this construction, I am of the opinion that the appeal should be allowed, but without costs, and that there should be no costs in the Court below.

MACLENNAN, J.A. :—This is an appeal by the defendants from the judgment of Street, J., reported in 3 O.L.R. 465, where the nature of the case is very fully stated.

The question raised is the power of the Bell Company to erect poles and to extend wires under or over the streets of the city, for the purpose of their business, without the consent of the city council.

The judgment complained of declares that the company may not carry any poles or any wires (whether such wires be above or under ground) along any street in the city without first obtaining the consent of the council; but may carry wires across streets, either above or under ground, subject, as to the location of the line and the manner in which the work is to be done, to the direction and supervision of the engineer, or such other officer as the city might appoint; unless such manager, officer, or council, after one week's notice in writing, should have omitted to make such direction, and subject to the other provisions of the company's Act of incorporation.

The company contended that they are entitled to place and maintain their lines over or above the streets, without the city's consent, except as to poles more than forty feet or wires less than twenty-two feet high, and that in the absence, after notice, of directions by the city, they could proceed without them.

The question depends on the legislation relating to the company, viz., two Acts of Parliament, 43 Vict. ch. 67 and 45 Vict. ch. 95; and one Act of the Legislature of Ontario, 45

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Vict. ch. 71 ; and upon secs. 91 and 92 of the British North America Act. The first of these Acts is the company's Act of incorporation, and it is conceded that, having regard to the powers sought and conferred, Parliament was the proper legislative body for that purpose, and that the Province could not have passed the Act such as it is. It is not a company with Provincial objects, within sec. 92 (11), British North America Act.

The powers conferred are (sec. 2) to construct, maintain, and operate lines for the transmission of messages by telephone, in Canada or elsewhere, and to make connection for their business with the line or lines of any telegraph or telephone company in Canada or elsewhere; and (sec. 3) to construct, erect, and maintain its line or lines along the sides of and across or under any highways, streets, bridges, watercourses, or across or under any navigable waters, either wholly in Canada or dividing Canada from any other country. And by sec. 4 power is given to purchase or lease any telephone line, established or to be established, either in Canada or elsewhere, connected or afterwards to be connected with its own lines; and to make arrangements with any person or company possessing any line of telegraphic or telephone communication; and by sec. 26 power is given to purchase and lease all such real estate as may from time to time be necessary for its purposes.

Now, Parliament might have contented itself with merely incorporating the company; with giving it power to act as a corporation throughout Canada; and might have left it to apply to the several Provinces to obtain the right to construct its lines on or over or under highways or private property, and thereby to interfere with property and civil rights; but it did not do so. It went further, and gave the company the absolute right to occupy highways, without consent or compensation, subject only to certain restrictions and conditions. It was not to interfere with the public use of highways, watercourses, or navigable rivers. The height of poles and wires was limited, and in cities, towns, and villages the opening up of the streets was to be done under the direction and supervision of the engineer or other officer appointed for the purpose by the municipal corporation. There are other restrictions also which it is



unnecessary to enumerate. It is evident from all this that Parliament regarded this company, and its work or undertaking, as being one over which it had plenary jurisdiction; as a company to which it could grant power to interfere with property and civil rights in the respective Provinces; that it was not like an insurance company, as was held in *Citizens' Ins. Co. v. Parsons*, 7 App. Cas. 96; or a building and investment company, as in *Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 App. Cas. 157, to which it could only grant the power of acting as a corporation throughout the Dominion; but was like a banking company, over which it had plenary jurisdiction by virtue of the British North America Act, sec. 91 (15), *Tennant v. Union Bank of Canada*, [1894] A.C. at p. 45; and like railways, canals, and telegraphs extending through two or more Provinces, by virtue of the exception contained in sec. 92 (10 a).

The question in this appeal appears to me to be whether the Bell Company ought to be held to be within the exception of sub-sec. 10 (a). If it is, it is to be regarded exactly as if it had been named in sec. 91, as within the exclusive legislative authority of Parliament.

I think it is within sub-sec. 10 (a). In the first place, it is a work or undertaking. Its analogy to a telegraph line is perfect. A telegraph is a means of *writing* at a distance. A telephone is a means of *speaking* at a distance. The means used are identical, viz., poles, wires, and electric power. If the one be a work or undertaking, the other is equally so. In the next place, its operation is both interprovincial and international. In the language of 10 (a), it connects the Province with other Provinces, and extends beyond the limits of the Province. The special case, p. 4, says the company carries on a long distance telephone business, and, although it does not say that it extends beyond the Province of Ontario, it is common knowledge that it does. The Act authorized that to be done, and the very first thing the company might have done after incorporation, might have been to connect Ottawa, in Ontario, with Hull, in the Province of Quebec, either by carrying their line across a bridge, or by sinking it in the Ottawa river. My learned brother Street in his judgment admits that the Act of

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incorporation "certainly authorizes a connection by means of their lines of two or more Provinces," but, he says, it does not in express terms require it, and that the object of their incorporation, as expressed in the Act, might have been served without such connection.

My learned brother thinks the connection with another Province by the company's works should have been expressly required, or must have been essential to the objects of the incorporation, or must actually have taken place, in order that Parliament might obtain exclusive legislative control. I cannot think so. Suppose a railway company incorporated by Parliament to construct a line between two points wholly within one Province, with power to extend it into other Provinces. Can it be said that its powers of expropriation, construction, and operation would be doubtful or invalid or in abeyance unless and until they carried the line into another Province? I think not. I think the jurisdiction of Parliament must be determined by the nature and extent of the work or undertaking *authorised*, as the same appears upon the face of the Act, and cannot depend upon what is done or left undone under it.

I therefore think that the company as originally incorporated was one to which Parliament could, and did, give not merely corporate power, but one to which it could, and did, give certain powers to interfere with property and civil rights in the several Provinces of the Dominion.

It is necessary now to consider the second Act relating to the company passed by the Dominion Parliament, and how far it has any bearing on the questions which have been submitted in the special case. The only material sections are numbers 2, 3, and 4. By sec. 2 the location of the company's lines is put in the same position as the opening up of a street, as regards the supervision and direction of the municipal corporation, through their engineer or other officer. By sec. 3 express power is given to extend the company's lines from one Province to another, and from Canada to the United States. And by sec. 4 the company's Act of incorporation, and the works authorized thereby, are declared to be for the general advantage of Canada. But the first of these amendments is the

only one material to be considered, if, as I have endeavoured to shew, the company was originally one to which Parliament could, and did, give power to interfere with property and civil rights.

It remains to consider the effect of the Provincial Act passed on the 10th March, 1882, about two months before the passing of the second Act of the Dominion Parliament, just referred to.

Before doing so, it may be pointed out that in the case of companies such as banks, railway companies, and other companies over which Parliament has plenary jurisdiction, and to which it might grant all the civil rights, and rights and powers over property, which such companies required for the convenient carrying out of their objects, Parliament might, nevertheless, leave such companies to procure such rights and powers from the Provinces. For example, Parliament might incorporate a railway company to construct a line from the Atlantic to the Pacific, but might leave the company to apply to the several Provinces for their powers of expropriation; and it would be competent to the Legislatures of the Provinces to grant the powers required. So, in the case of the Bell Company, if it deemed the powers over property and civil rights which Parliament had given it to be insufficient, or inadequate, it might obtain additional or larger powers from the Provincial Legislatures. That is what the company did. The Act was passed upon the petition of the company. It recites its incorporation by Parliament, with certain powers; but that doubts had arisen as to those powers, in regard to those portions of its work and undertaking which were local and did not extend beyond the limits of the Province. Then by sec. 2 similar powers to those granted by sec. 3 of the Act of incorporation are granted, but qualified and modified in certain particulars.

By the Dominion Act the consent of a city, etc., must be obtained for more than one line of poles along any street. By the Ontario Act consent must be obtained for carrying *any* poles or wires along *any* street. By the Dominion Act, where lines of *telegraph* are already constructed, no poles shall be erected on the same side of the street, without consent. By the

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Ontario Act, in such cases no poles whatever shall be erected on the same street without consent. By the Dominion Act (as amended by 45 Vict. ch. 95) the location of the line or lines, and the opening of the street for poles, or for underground wires, is to be done under the direction and supervision of the engineer, etc. The Provincial Act adds, unless the engineer, etc., shall have omitted, after one week's notice in writing, to make any direction.

Thus the company, having obtained certain powers to interfere with property and civil rights of the city, etc., but entertaining doubts of their validity, went to the Legislature and requested, and obtained, the removal of its doubts and the grant of similar powers, but with restrictions and qualifications to which they were not previously subject. And the important and novel question arises, what the effect of that may be. I do not find that the Provincial Act gives the company any right or power which they did not previously possess. Its effect is solely to limit, restrict, and even abrogate, some of its powers. Are the company bound by an Act relating to property and civil rights simply because they applied for it and it was passed at their request? Undoubtedly the Legislature could not have affected the company's rights by passing such an Act against its will or without its knowledge. The company had doubts as to the validity of its powers under the Act of incorporation, and went to the Legislature to have them removed. The Legislature did so, and by so doing precluded every city, town, and incorporated village from afterwards raising any question. In asking for confirmation of its powers, the company consented to have them qualified and restricted in certain respects, and the question is, whether it is not bound by that, as between it and the cities, towns, and incorporated villages of the Province. I think it is clear that the company could *agree* with the city to construct its works in the manner and subject to the restrictions and limitations contained in the Act in question, and would be bound by the agreement. It might do this for some valuable consideration, or might do it in order to stand in better favour with the city than some other similar company. For some sufficient reason it went to the Legislature and said: We have certain civil rights and rights of property in the Province,



no matter whence derived, it may be from Parliament, it might be by express concession from certain cities, towns, etc.; we wish to have those rights somewhat diminished or modified. The Legislature accedes to the request and passes the Act. I think it had jurisdiction to do so, at the company's request, by virtue of its legislative power over property and civil rights in the Province. There can be no doubt that the *municipalities* are bound by all the provisions of the Act, and the whole subject dealt with being a matter between the company and the municipalities, if the Act binds the one, the other, at whose instance the Act was obtained, ought also to be bound. The company has asked the Legislature to modify its powers and rights over highways in the three named classes of municipalities, and the Legislature has done so. I think the company is estopped from denying the power of the Legislature after it has complied with the request.

In *Roths v. Kircaldy Waterworks Commissioners* (1882), 7 App. Cas. 694, Lord Watson said, p. 707, speaking with reference to the defendant company's Act: "But such statutory provisions as those of sec. 43, occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature;" and in *Davis v. Taff Vale R.W. Co.*, [1895] A.C. 542, at p. 552, the same learned Lord referred to his observation in the former case, and said: "Where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement." In *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 154, Lord Eldon said, at p. 162, with reference to railway Acts: "When I look at these Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater

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oppression than anything in the whole system of administration under our Constitution. . . I apprehend that those who come for them to Parliament, do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do; and that they shall do nothing else—that they shall do and forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.” In *York and North Midland R.W. Co. v. The Queen* (1853), 1 E. & B. 858, the Court of Exchequer Chamber (at p. 867) commented on this language of Lord Eldon, and said there was nothing in it to which it was necessary to take the least exception, unless they were supposed to mean that words of permission should read as words of obligation. In *Parker v. Great Western R.W. Co.* (1844), 7 M. & G. 253, Tindal, C.J., said (p. 288): “The language of these Acts of Parliament is to be treated as the language of the promoters.” And see Maxwell on Statutes, 3rd ed., p. 319 *et seq.*; and Hardcastle on Statutes, 3rd ed., p. 488 *et seq.*

My opinion briefly is this: A Dominion corporation may obtain its powers over property in a particular Province, either from Parliament or from the Legislature of the Province, or partly from one and partly from the other. In the present case, by sec. 26 of its Act of incorporation, the company obtained from Parliament power to purchase and lease property, but no power of expropriation; it might obtain the latter power in any Province from its Legislature. If that be so, it follows, I think, that a Dominion corporation may, by application to the Legislature of a Province, have its powers over property in that Province enlarged, diminished, varied, or qualified in any manner whatever, whether such powers were originally obtained from the Dominion or from the Province, or partly from the one and partly from the other.

For these reasons I am of opinion that the company, having applied for and procured this Act of the Legislature, modifying its rights and powers on and over highways, etc., is as much bound thereby as the municipalities, and that the Act is binding on both.

That being so, the judgment appealed from is right and ought to be affirmed.

*Appeal allowed; MACLENNAN, J.A., dissenting.*

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CONNER V. DEMPSTER.

Oct. 10.

*Venue—Cause of Action—Con. Rule 529 (b)—Declaratory Action.*

“Cause of action” in Con. Rule 529 (b), means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience.

*Quære*, whether an action for a declaration of right falls within the Rule?

A MOTION by the defendant to change the venue from Kingston to Brockville was argued before the Master in Chambers, on the 8th of October, 1903.

The statement of claim set out that a conveyance of certain land in Gananoque, in the county of Leeds, was made to the plaintiff in which reference was made to a certain plan; and that subsequently a deed was made by the same grantor of an adjoining lot to the defendant, and also of certain parcels over which the plaintiff alleged he was entitled to a right of way by reason of the plan aforesaid, and his conveyance referring thereto.

The prayer for relief asked for (1) a declaration that the plaintiff was so entitled, and (2) an injunction restraining the defendant from interfering with the plaintiff's use of the said right of way. The parties both resided at Gananoque.

*H. W. Mickle*, for the defendant.

*A. H. F. Lefroy*, for the plaintiff.

OCTOBER 10. THE MASTER IN CHAMBERS:—It is clear that no “*substantial grounds*” are disclosed for changing the venue. I think this was conceded on the argument.

It was argued for the plaintiff that the term “cause of action” was not applicable to a case of this character, being one unknown to the common law, and that Rule 529 (b) has no application. In this Mr. Lefroy is probably correct. But it is not necessary to decide this question at present, as the motion can be disposed of on another ground.



The Rule seems to require that the *whole* cause of action should have arisen in the county where the parties reside. This seems to follow from the judgment of the Chancellor in *Bertram v. Pursley* (1903), 2 O.W.R. 264. For if in that case the defendant had been entitled to rely on the facts as bringing it within the Rule, it is not to be supposed that he would have been put upon terms of paying any extra expense of the trial at Simcoe.

Then, it is clear that here the whole cause of action did not arise in Leeds. Certainly the execution by the common grantor of the deed to the defendant was the beginning if not the whole of the alleged cause of action. And this deed was executed at Toronto, and presumably delivered there also (though there is no evidence on that point).

Now, if it had been necessary to take proceedings against the grantor as for a breach of an agreement to convey to the plaintiff the lot subsequently conveyed to the defendant, and the grantor were resident now in Quebec, the execution of the deed at Toronto would have been such a breach committed within Ontario as would have brought the case within Rule 162 (e). See *Offord v. Bresse* (1894), 16 P.R. 332, following *Cherry v. Thompson* (1872), L.R. 7 Q.B. 573, which case was also followed and approved in *Holland v. Bennett*, [1902] 1 K.B. 867.

The execution of the deed complained of would, therefore, be properly considered to be the "*causa causans*" of the action.

Seeing then that the whole cause of action, to say the least, did not arise in the county of Leeds, I hold that Rule 529 (b) does not apply, and that the motion must be dismissed. The point is, however, new; and the costs will, therefore, be in the cause. The Rule is one which should in my view be complied with in every case where it applies. I would refer to *Brown v. Hazell* (1903), 2 O.W.R. 784, at p. 785.

I note further that in *Cherry v. Thompson*, at p. 578, it appears to be considered that "cause of action" means either the entire cause of action or "only the act of the defendant which immediately gives to the plaintiff his cause of complaint." Either view will support the argument of Mr. Lefroy

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in the present case, for here the common grantor may, in some respects, be regarded as the real defendant.

If the claim of the plaintiff is sustained it may be that the defendant Dempster will be entitled to some remedy against the grantor, though the deed of the 7th of May, 1903, to him is only for a nominal consideration. In any view it is clearly for the benefit of the grantor that the plaintiff's action should fail and the deed to Dempster be upheld.

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[IN CHAMBERS.]

TAYLOR V. TAYLOR.

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Oct. 31.

*Writ of Summons—Service—Substitutional Service—Solicitor.*

After instructions to a solicitor to accept service of a writ of summons had been revoked, an order was obtained by the plaintiff for substitutional service of the writ upon him:—

*Held*, that the solicitor had no *locus standi* to move to set aside the order.

An error in the report of *Young v. Dominion Construction Co.* (1900), 19 P.R. 139, pointed out.

A MOTION by a solicitor to set aside an order for substitutional service of the writ of summons upon him was argued before the Master in Chambers, on the 29th of October, 1903., The solicitor had been instructed in June, 1903, to accept service of the writ, but afterwards, on the 21st of August, 1903 he told the plaintiff's solicitor that his instructions had been withdrawn about a fortnight before, and he refused to accept service. The order for substitutional service was then obtained.

*W. J. Elliott*, for the applicant.

*H. D. Gamble*, for the plaintiff.

October 31. THE MASTER IN CHAMBERS:—A preliminary objection was raised that the applicant had no *locus standi*. Mr. Elliott relied on *The Pommerania* (1879), 4 P.D. 195, and *Young v. Dominion Construction Co.* (1900), 19 P.R. 139.

A consideration of the matter leads me to the conclusion that the objection must be sustained. The case in 4 P.D. seems to have been decided on the merits, and no objection was made that the applicants had no status.

The report of the case in 19 P.R. is misleading. The original papers have been sent to me. From these it appears that the motion was made on behalf of the defendants and not of the solicitors. It may be that the application in *The Pommerania* was of the same nature.

I have also been referred to a case of *Heaslip v. Heaslip*, in which a similar application was dismissed with costs by the Master in Chambers. No appeal was taken from that order.

Reference may usefully be made to what was said in a case analogous of *Martin v. Martin* (1832), 3 B. & Ad. 934; also to the observations of Armour, C.J., in *Macdonald v. Crombie* (1883), 2 O. R. 243, at p. 246: "It is well settled that an irregularity can only be taken advantage of by a party to the suit, or by his representative."

While it may still be open to the defendant hereafter to move against the order in question and any proceedings founded thereon, I do not think that the applicant is entitled to do so, when he expressly negatives any professional relationship with the defendant.

I was at first inclined to think that, following *Heaslip v. Heaslip*, the motion should be dismissed with costs. But as the application was apparently justified by the incorrect report in 19 P.R., I consider that justice will be done by dismissing the motion without costs.

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## STATE SAVINGS BANK V. COLUMBIA IRON WORKS.

Aug. 28.

*Writ of Summons—Address of Defendant—Foreign Defendant.*

The address of the defendant is a necessary part of the writ of summons and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was, on his application, set aside with costs.

A MOTION on behalf of the defendant Botsford to set aside the writ of summons herein, the copy served, and the service thereof, because of the omission of the address of any of the defendants, was argued before the Master in Chambers on the 25th of August, 1903.

*C. A. Moss*, for the defendant Botsford.

*W. B. Raymond*, for the plaintiffs.

August 28. THE MASTER IN CHAMBERS:—The writ in question was issued from the office of the local registrar at Sarnia. No other explanation of the defect is given except that an affidavit of a clerk of the plaintiff's solicitors says "through a clerical error the addresses of the several defendants herein were accidentally omitted." On the other hand an affidavit of the defendant Botsford is filed, stating that he was personally served at Meaford, though he is not a British subject but a citizen of the United States residing at Port Huron. These facts are not in any way disputed. Mr. Moss relied on *The W. A. Sholten* (1887), 13 P.D. 8. That case does not seem distinguishable in its facts. In giving judgment it was said: "By the forms prescribed by the orders under the Judicature Act the address as well as the name of the defendant is a necessary part of the writ." This is equally applicable under our Rules 127 and 128. No doubt in a proper case relief might be given to the plaintiffs under Rule 1224. But here no good purpose would be effected by allowing an amendment *nunc pro tunc*, as such amendment would at once shew that the writ was irregular or, more correctly, a nullity, as having been issued without an order.



The indorsement does not disclose any grounds that are required by Rule 162, and all such are distinctly negatived by the defendant Botsford's uncontradicted affidavit. What the object of the plaintiffs was in launching their proceedings in Ontario is not easy to understand. The case of *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670 (cited by Mr. Moss), lays it down (p. 684) that "when the action is personal the courts of a country in which a defendant resides have power, and they ought to be resorted to, to do justice." I might also refer to *Connolly v. Dowd* (1897), 18 P.R. 38, as having some bearing on the question of the validity of service of process under similar circumstances.

I am therefore obliged to hold that the writ in this case was issued *per incuriam*, and that the same was a nullity and should be set aside with costs.

It is not made quite clear whether Botsford is acting on behalf of himself only, or of all the defendants. His affidavit speaks of them all. If its statements are true, the writ should be set aside altogether beyond question. If Botsford is only acting on his own behalf, then it will be sufficient to direct his name to be struck out of the writ and to give leave to the plaintiffs to amend it otherwise as they may be advised. It would be useless to serve a copy on any of the other defendants in its present defective form.

R S. C.

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## [IN THE COURT OF APPEAL.]

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June 29.

## BAXTER &amp; Co. v. JONES.

*Principal and Agent — Negligence—Fire Insurance—Agent's Liability—  
Gratuitous Undertaking—Mandate.*

The defendant, a general insurance agent, gratuitously undertook to have an additional policy placed on the plaintiffs' property, and also to notify the companies already holding policies of this additional insurance. A loss occurred, and, owing to defendant having neglected to give the notice, the plaintiffs had to compromise their claim at \$1,000 less than they otherwise would have recovered :—

*Held*, that the defendant having undertaken, though gratuitously, to perform the business, and having actually entered on the execution of it, was liable for the negligence which had caused loss to the plaintiffs.

*Coggs v. Bernard* (1703), 2 Ld. Raym. 909, specially considered.

THIS was an appeal by the defendant from the judgment of Lount, J. at the trial, reported 4 O.L.R., 541, and was argued on May 13th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, and GARROW, J.J.A.

The facts of the case are fully set out in the judgment of OSLER, J. A.

*G. F. Shepley*, K.C., and *S. F. Washington*, K.C., for the defendant, contended that there was here no bargain founded on a consideration, nor any entering upon an employment; and that the plaintiffs had sustained no damage. They relied on *Elsee v. Gatward* (1800), 5 T.R. 143; and *Johnson v. Graham* (1863), 14 C.P. 9; and contended that *Wilkinson v. Coverdale* (1793), 1 Esp. 75; and *Maydew v. Forrester* (1814), 5 Taunt. 615, were distinguishable.

*W. R. Riddell*, K.C., and *L. F. Stephens*, for the plaintiffs, contended that by the act or neglect of the defendant the plaintiffs had been put in such a position that they had lost their legal right to recover on the policies, though the companies might allow void claims or waive objections: R.S.O. 1897, c. 203, s. 170; and the defendant was rightly held responsible for the loss they had thus sustained.

June 29. OSLER, J.A.:—The action is for negligence in omitting to give notice of a subsequent insurance.

The plaintiffs are an incorporated milling company. The defendant is a general insurance agent through whom the plaintiffs had, in January, 1900, effected insurance in several companies for whom the defendant was acting, upon their mills and machinery, to the amount of \$6,000, of which the sum of \$1,500 was upon a gasoline engine.

In the month of January, 1901, the plaintiffs determined to place an additional insurance of \$500 upon their general mill machinery. They applied to the defendant to procure it, and they allege that he promised and agreed with them to do so and also to give the necessary notice of the further insurance to the companies on the existing risks. The defendant procured the new policy but negligently omitted to give the notice, and in consequence of such omission the plaintiffs sustained a loss of \$1,000.

The learned trial Judge found the alleged agreement and breach thereof proved, and that the plaintiffs had sustained damage in consequence to the full amount claimed, for which he directed judgment.

The defendant's points are (1) that if there was any agreement in fact (which he denies) it was gratuitous, and without consideration; and (2) if the plaintiffs suffered loss in not being able to recover the whole amount of the insurance from the companies, it was not by reason of the defendant's omission to give notice of the further insurance but because of a different objection to the claim in respect of the insurance upon the gasoline engine.

First, then, as to the agreement. Baxter, the plaintiffs' manager stated that before the insurances of January, 1900, were placed the defendant said that if they "would give him all the insurance he would look after it, see it was properly placed, all the policies made concurrent, and all the necessary notices of any changes which might be made—in fact he said we will take care of you."

Some changes in and re-arrangement of these insurances were made in December of the same year, which the defendant attended to, and in January, 1901, there were existing insurances on the plaintiffs' property in four companies, amounting

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to \$6,000, \$1,500 of which was on the gasoline engine, as already mentioned.

On January 17th, 1901, the plaintiffs applied to the defendant to procure for them an additional insurance to the extent of \$500 upon their mill machinery. The defendant placed it in the Millers & Manufacturers Insurance Company for a year from January 21st, and a formal application was sent forward to him by the manager to be signed by the plaintiffs. This their manager did on January 23rd or 24th, on which latter day he paid the defendant the premiums on the new insurance. An undertaking given by the defendant on this occasion was also relied on. Baxter said "at the time I signed the application I said, 'now Mr. Jones, you will see that the other companies get notice of this additional insurance. You won't forget.' He says 'that is all right we will take care of it.'" The policy was shortly afterwards issued bearing date January 21st, 1901, and sent to the defendant. Baxter met him on the street about a month afterwards, and said, "Mr. Jones did you attend to giving those companies notice?" He said, "Yes, we will attend to it. It is all right."

Baxter's answers on cross examination made it clear that when the insurance of January-December, 1900, was effected nothing more was said than that if the plaintiffs would give the defendant the whole of their insurance, he would take care of it, and that any notices which might then have been spoken of—a matter which is left very doubtful and uncertain—were such as might be necessary to complete those insurances and make them concurrent. Further insurance was not then contemplated. As to the insurance of \$500 of January, 1901, the only undertaking on the defendant's part was that proved to have been given on January 23rd or 24th. By some slip or oversight of the defendant or the clerks in his office, no notice of the new insurance was given to the other companies. A fire occurred on April 26th following, and these companies insisted that their policies were avoided by reason of notice not having been given to them, and they availed themselves of this objection as the plaintiffs contend, to force a settlement of \$1,000 less than they would have otherwise have been obliged to pay for the loss.



The question is whether on this evidence, any agreement is made out, for the breach of which the defendant is responsible. The plaintiffs cannot, in my opinion, rely upon anything which took place in January, 1900, when the four policies were effected, because their manager's statement of what the defendant then undertook to do is too vague and indefinite to establish a general engagement by the defendant to give notice of subsequent insurance effected or obtained by him; nor were the policies left in his custody to be looked after. The plaintiffs must, therefore, rely on what took place in January, 1901. The defendant did then undoubtedly at some time promise to give the necessary notices of the new insurance to the companies on the existing policies. Was this as part of the employment he then undertook, or was his employment confined to procuring the new policy, the promise to give notice being an independent or subsequent promise made without consideration, and therefore a gratuitous one which imposed no liability in the event of its non-performance?

If the defendant's employment and promise was entire to do both acts, viz., to procure the new insurance and to give the notices, then, even if it was, as it has been held in the Court below, a gratuitous promise, yet having proceeded upon his employment the defendant would be liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs. He knew the importance of giving the notices, and the effect of the omission to do so, upon the plaintiffs' other policies. To stop when he had only obtained the insurance was simply to go so far with the business as to cause a direct injury to the plaintiffs if he failed to follow it up by notice to the other insurers, and cannot be regarded otherwise than as actionable negligence.

It would rather appear that nothing was said of giving notice when the defendant was first employed or instructed to procure the insurance, but before the business was complete, and while the plaintiffs might have still withdrawn, they requested the defendant and the latter undertook to give it. Defendant might have refused to assume that duty, and the plaintiffs would then have known that they must look after it themselves, or could have withdrawn their application and sought insurance elsewhere. But the whole business having been ultimately entrusted to

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and assumed by the defendant before any part of it had been completed, the plaintiffs have a right to complain that the defendant negligently proceeded with it only so far as to be detrimental to them.

I think the learned Judge rightly regarded the transaction as one of mandate, so that if the defendant had not entered upon the execution of the business entrusted to him he would have incurred no liability, *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, 1 Smith's L.C. 11th ed. p. 173, but "it is well established that one who enters upon the performance of a mandate or gratuitous undertaking on behalf of another, is responsible not only for what he does, but for what he leaves unfulfilled, and cannot rely on the want of consideration as an excuse for the omission of any step that is requisite for the protection of any interest intrusted to his care." Hare on Contracts (1887), pp. 163, 164; Parsons on Contracts, 8th ed., vol. 2, ch. 11, sec. 2, pp. 103, 104; *Thorne v. Deas* (1809), 4 Johns, N.Y. 84; *Elsee v. Gatward*, 5 T.R. 143.

In *French v. Reed* (1814), 6 Binney (Penn.) 308, the plaintiffs requested the defendants to effect insurances on a vessel from Philadelphia to two ports in the Island of San Domingo. The defendants had insurance made to one port only, which the vessel reached in safety, but was captured on her voyage from that port to the other. It was held that though the defendants were not bound to accede to the plaintiffs' request, yet when they agreed to do as he desired, and through want of due care did it ill, they were liable for the consequences. See also *Eddy v. Livingston* (1865), 88 Am., Dec. 122; the cases referred to in the judgment below; and *Balfe v. West* (1853), 13 C.B. 466; *Fish v. Kelly* (1864), 17 C.B.N.S. 194; *Johnston v. Graham* (1863), 14 C.P. 9.

The next question is whether the plaintiff's loss was caused by the neglect of the defendant to give notice of the additional insurance.

On the proofs of claim being sent in, the companies at once took the position, the soundness of which has not been disputed, that the omission avoided the policies, and that they were under no legal liability thereon. They did not, however, press this to the extent of an absolute refusal to pay, and

after some negotiation they paid the plaintiffs a lump sum of \$6,000 in settlement, deducting \$1,000 from the claim. The defendant contends that this sum was deducted from the insurance on the gasoline engine, in respect of which the adjuster for the companies objected that it was void on the further ground, for which the defendant was not responsible, that there had been a material alteration in the risk, the engine having ceased to be in use for some time before the fire, the power being supplied by an electric motor. I think the evidence leaves little room for doubt that this was the item which formed the subject of the deduction, and that the second objection I have mentioned was made use of by the adjuster to reduce that item to such a figure as the engine would have been insurable for in its unused condition. From the evidence of the adjuster it is however, tolerably clear that very little confidence was felt by the companies in the second objection, and that if that had been the only one they would not have pushed it so far as to resist payment of the claim. The controlling objection was that of the omission to give notice of the further insurance. It was this which placed the plaintiffs in the companies' power and enabled them to dictate the terms on which only they would settle the loss. They said, in effect, "though we are not liable at all because you did not give us notice of the subsequent insurance, we will pay what is reasonable. But of that we must be the judges, and we think that, under the circumstance, the insurance on the gasoline engine must be reduced by \$1,000." The plaintiffs had no option but to accept the situation, for even if the objection to the particular item could not have been maintained, the over-riding objection of want of notice remained, and was insisted on and was sufficient to have defeated the claim *in toto*. I therefore think that the judgment should be affirmed, and the appeal dismissed with costs.

MACLENNAN, J.A.:—I think the case depends wholly upon what took place between the parties in January, 1901, when the \$500 policy was effected, and is not affected by anything which passed in connection with the previous insurances.

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On January 17th, 1901, the plaintiffs instructed the defendants to procure for them additional insurance on the buildings and machinery of their mill for the sum of \$500. On the 19th the defendant applied to the Millers & Manufacturers Co. for a policy for the additional \$500, that company already having a policy for \$500 on the same property, and it was requested that the policy should attach on Monday, the 21st. The company granted the application and issued a policy bearing date January 21st, and containing acknowledgment of all other concurrent insurance. It is to be gathered from the evidence that although the policy was issued on January 21st, the formal application was not signed by the plaintiff nor the premium paid until the 24th of January. It does not appear which was first, the signing of the application or the payment of the premium, the premiums on the other policies being due and having been paid on that day. The contract on which the plaintiffs rely is related thus by Mr. Baxter. In his evidence in chief he says: "At the time I signed the application, I said: Now Mr. Jones, you will see that the other companies get notice of the additional insurance? You will not forget? He says: 'That is all right, we will take care of it.'" He repeats the statement on cross-examination in almost the same words, and adds: "I know it was just as I was getting up from signing the application" that the words related were spoken.

The defendant was an agent of the Millers & Manufacturers Co., and also of the other companies which had risks for the plaintiffs on the same property, and Mr. Baxter says he went to him for this additional insurance just because his other risks were in his office, and, it is not contended that there was any consideration between the plaintiffs and defendant in connection with the business. The only consideration in the matter was the premium which was paid to the company. As between the plaintiffs and defendant, therefore, the whole business was voluntary. It was contended that the procurement of the policy and the promise to notify the companies were one single transaction, and that having undertaken the business and performed it negligently, the defendant was responsible although there was no consideration



for the contract : *Coggs v. Bernard*, 1 Sm. L.C. 11th ed. p. 173, and *Elsee v. Gatward* (1800), 5 T. R. 143.

I have had a good deal of doubt and hesitation in this case, and I think the question is a very nice one. It is clear that if the defendant's promise to give notice had been made after the insurance had been completed, he would not have been liable, for want of some consideration. But it was made at latest at the moment of completion, and what was promised had a very material and important bearing upon the principal business. I think the transaction is not to be regarded as an application by the plaintiffs to the defendant, merely as the agent of and representing the Millers & Manufacturers Insurance Company for insurance in that company; but that the plaintiffs applied to the defendant to procure insurance *for them* in some company to be selected and recommended by him, the effect being that he procured this insurance for them at their request, and in connection with it, promised to give the required notices to the other companies. Now he did everything which he undertook to do except to give the notices. The new insurance was perfectly regular and valid in every respect. The company had due notice given to them of all the concurrent insurance, and it was embodied and expressed in the policy. The notices to the other companies were not essential to the completion or to the validity of the new insurance, and so were something distinct. The plaintiffs might have given the notices themselves. Mr. Baxter might have gone to the bank where the existing policies were held as security, and have given the notices immediately after signing the application and paying the premium. If the defendant had been acting solely for the insurance company in effecting the insurance, his promise to give the notices would have stood by itself, and the breach of it would not have been actionable. But because he was procuring the insurance at the request of the plaintiffs, to that extent he was acting for them, which makes it necessary to consider how far, if at all, he was bound to give the notices, although all that he did was as between him and the plaintiffs purely voluntary. In *Coggs v. Bernard*, the defendant promised to hoist some hogsheads of brandy from one cellar and deposit them in another. In doing

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so a cask was staved, and the contents were lost. There the negligence was in doing the very act which was to be done, and the defendant was held to be liable though he was not to have any reward for what he undertook to do. That was a case of bailment, inasmuch as the defendant had taken the goods into his possession. But the judgment was not rested wholly upon that circumstance. At p. 181, Lord Holt in his elaborate judgment, refers to the case of a carpenter having undertaken to build a house, but who had not done it, and it was adjudged the action would not lie (i.e. the promise having been voluntary), and he adds: "But then the question was put to the Court—what if he had built the house unskilfully—and it is agreed in that case an action would have lain." In *Elsee v. Gatward*, 5 T.R. 143, the action was against a carpenter. One count stated that the defendant had agreed to repair a house for the plaintiff within a given day, but did not do so, and the count was held to be bad. The other count stated that the defendant had agreed to perform the carpenter's work on the plaintiff's buildings and to use in doing so certain old materials of the plaintiff's, but that in doing the work he used new materials instead of the old which increased the expense, and the count was held to be good. In *Skelton v. The London & North-Western R.W. Co.* (1867), L.R. 2 C.P. 631 at p. 636, Willes J., said the result of the decision in *Coggs v. Bernard* was that "if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it." Two insurance cases are cited in the notes to *Coggs v. Bernard*, p. 183, viz. *Wilkinson v. Coverdale*, 1 Esp. 75, and *Wallace v. Telfair* (1786), 2 T.R. 188 (n) in which these principles were applied to voluntary engagements to procure insurance.

Now, in this case, unless notice of the new insurance was given to the existing insurers, the new policy was certain to work injury to the plaintiffs by making void the existing policies. This the defendant knew, and as part of his undertaking to procure the new insurance, I think that he undertook and agreed that it should not be done injuriously to the plaintiffs. His omission to give the notices has that effect. It put the plaintiffs at the mercy of the former insurers, when the

loss occurred, and compelled them to accept whatever they chose to pay, which was \$1000 less than they would, as I think, having read the evidence, have received. Upon the whole I think the judgment is right and should be affirmed

Moss, C.J.O. and GARROW, J.A. concurred.

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BRIDGE V. JOHNSTON.

Sept 9.

*Indian Lands—Assignment of Timber—Interest in Land—Registration—Conditional Assignment—Priorities—Actual Notice.*

The owner of unpatented Indian lands administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. 1886, ch. 43, made a sale of certain timber thereon and executed an assignment or transfer to the vendee, by which the vendor agreed to sell and the vendee to purchase all the timber of a certain specified kind upon the land described, for a named price, payable as set out, and by which the vendee was "to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term:"—

*Held*, that the interest assigned was an interest in land, and not a mere chattel interest.

*Summers v. Cook* (1880), 28 Gr. 179, and *Ford v. Hodgson* (1902), 3 O.L.R. 526, followed.

*Held*, also, that the assignment was not an unconditional assignment within the meaning of sec. 43 of the Indian Act, and was incapable of being registered in the manner prescribed by the Act, and therefore did not require registration to preserve its priority, and was entitled to priority over a subsequent registered assignment.

*Harrison v. Armour* (1865), 11 Gr. 303, followed.

*Seem*, that, although there is no provision in the Indian Act as to "actual notice," the law laid down in *Agra Bank v. Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, would apply if the subsequent assignee had at the time of registration such notice of the prior assignment.

ACTION for an injunction and damages in respect of alleged trespasses to land. The facts are stated in the judgment.

The action was tried by FERGUSON, J., without a jury, at Walkerton, on the 26th May, 1903.

*David Robertson*, for the plaintiff.

*C. S. Cameron*, for the defendant.

September 9. FERGUSON, J.:—The lands in question are lot number 8 in the 8th concession east of the Bury road in the township of Eastnor, in the county of Bruce, and are lands originally surrendered by and set apart for the use of the Chippewas of Saugeen, Owen Sound Indians, and held, sold, and administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. ch. 43. The lands are unpatented. It was freely admitted by counsel at the trial that on the 27th November, 1899, James W. Freckleton was the owner of and had a good title to these lands. On that day the said James W. Freckleton made a sale



of certain timber on these lands to one Jamieson Johnston, and duly executed an assignment or transfer of this timber. The operative parts of the assignment are in the words and figures following, that is to say :—

“The party of the first part (Freckleton) agrees to sell and the party of the second part (Jamieson Johnston) agrees to purchase all the timber 10 inches and over in size on lot 8, concession 8, township of Eastnor, E.B.R., for the price or sum of \$350, payable as follows.” (The times and mode of payment of the purchase money are then stated.) “The party of the second part is to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term.”

Jamieson Johnston did not register this assignment in the office of the Superintendent General, nor has it, nor have any of the assignments made under it hereafter referred to, been so registered.

On the 2nd March, 1902, Jamieson Johnston assigned and transferred all his interest in respect of the said timber and land to his brother Robert James Johnston, and on the 16th December, 1902, the said Robert James Johnston assigned and transferred all his right and interest to another brother, Samuel Johnston, the defendant.

A part of the timber mentioned in the assignment to Jamieson Johnston has been cut and removed, but there is a substantial part of it remaining uncut upon the land. On the 15th November, 1900, the said James W. Freckleton sold, assigned, and transferred the land, this lot No. 8, to the plaintiff, Thomas John Bridge, his heirs and assigns forever, and at the trial it was admitted that this conveyance had been duly registered in the office of the Department of Indian Affairs, with the Superintendent General, on the 29th November, 1900. Freckleton had contracted to sell the land to one Bosley, who had contracted to sell it to the plaintiff. It was agreed that Freckleton should convey and assign to the plaintiff, instead of having two conveyances, and the conveyance was accordingly made directly to the plaintiff. At the time this was done, and of course before the plaintiff registered his conveyance, both Bosley and Freckleton told him that Jamieson Johnston had

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the right to cut timber on the land until the spring of 1902, but there was not anything said about any assignment or transfer from Freckleton to him, and it is not shewn that the plaintiff had notice or knowledge of such an assignment or transfer till long after the registration by him of the transfer to himself.

The defendant was proceeding to cut and take away timber from the lot in the spring of 1903, when the plaintiff brought this action.

Section 43 of the Act provides for the keeping of a book by the Superintendent General for registering, at the option of the party interested, the particulars of any assignment, and provides that every assignment registered shall be valid against any assignment, previously executed, which is subsequently registered or is unregistered, and that every assignment when registered shall be unconditional in its terms. The original Act, 43 Vict. ch. 28, sec. 43 (D.), provides, amongst other things, that any assignment to be registered must be unconditional in its terms.

This law of registration seems to apply to an assignment made as well by the original purchaser or lessee of Indian lands or his heirs or legal representatives, as by any subsequent assignee or the heirs or legal representatives of any such assignee. The section of the Act respecting registration would, according to its terms, seem to be absolutely decisive as to priority. There does not seem to be any provision (as in our Registry Act) as to "actual notice" had by the subsequent assignee who first registers his assignment, but I think the law so clearly laid down by Lord Cairns in the case *Agra Bank v. Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, must apply, and that, although the plaintiff's assignment was registered as aforesaid, yet, if he had at the time actual notice of the assignment to Jamieson Johnston, he cannot have the priority he seeks. Such actual notice has not, I think, been proved. There are other cases to the same effect as the *Agra Bank* case.

A question may arise as to whether the law of registration has any application. This rests upon the contention that the interest purchased by Jamieson Johnston from Freckleton was a chattel interest, and not an interest in land. The cases in our Courts relating to this subject are somewhat numerous and

not all in accord. I have perused a large number of these cases, among them being *Johnston v. Shortreed* (1886), 12 O.R. 633; *Corbett v. Harper* (1884), 5 O.R. 93; *Summers v. Cook* (1880), 28 Gr. 179; *McNeill v. Haines* (1889), 17 O.R. 479; *Steinhoff v. McRae* (1887), 13 O.R. 546; *Handy v. Carruthers* (1894), 25 O.R. 279; *Ford v. Hodgson* (1902), 3 O.L.R. 526; and I cannot avoid being of the opinion that the interest assigned by Freckleton to Jamieson Johnston was an interest in land and not a mere chattel interest. To this opinion I am bound by the cases *Summers v. Cook* and *Ford v. Hodgson*, above. It would appear, as I think, if there were no further or other controlling elements in the case, that the priority is in favour of the plaintiff. See the cases *McLean v. Burton* (1876), 24 Gr. 134, and *Ferguson v. Hill* (1854), 11 U.C.R. 530.

I am, however, after the best consideration I have been able to give the subject, of opinion that the assignment from Freckleton to Jamieson Johnston was a conditional document, that is to say, that it was not an unconditional assignment within the meaning of the Act. It was not, as I think, unconditional in its terms, and, according to the words, and, as I think, the spirit of the Act, it was incapable of being registered in the manner prescribed by the Act. The local agent of the Department was called as a witness, and he was of the opinion that the document was incapable of registration, and said that, had it been offered to him to forward for registration, he would have rejected it, on the grounds stated above. Then, according to the doctrine of the case *Harrison v. Armour* (1865), 11 Gr. 303, and the cases and authorities referred to in it, this document (the assignment from Freckleton to Jamieson Johnston) did not require registration to preserve its priority.

This assignment was first in time. It was not, as I think, affected by the registration of the assignment to the plaintiff. I am of the opinion that the title of the defendant is superior to that of the plaintiff, and that the plaintiff's action should be dismissed, and I see no good reason for withholding costs. The interim injunction is also dissolved with costs, including the costs of the motion for it. The action is dismissed with costs.

*Order accordingly.*

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D. C.

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Sept. 14.

## STRUTHERS V. THE CANADIAN COPPER COMPANY.

*Contract—Company—Medical Attendance for Men—"Hospital Fund"—  
Implied Obligation.*

A fund called "The Hospital Fund" was formed by a mining company from contributions deducted from the wages of the employees, for the purpose of providing medicine and medical attendance for those of the men who required it, physicians being attached to the works of the company whose duty it was to attend the men and provide the necessary medicines:—

*Held*, that no obligation was imposed on the company towards another physician employed by the men to pay for his services out of this fund.

THIS was an appeal by the defendants, a mining company operating mines at Sudbury, Ontario, from the judgment pronounced by Meredith, J., at the trial before him without a jury at North Bay, on the 14th November, 1902, so far as related to the sum of \$280, for which he directed judgment to be entered against the defendants, not to be paid by them personally, but out of what was called the "Hospital Fund."

The facts are stated in the judgment of MEREDITH, C.J.C.P.

On February 19th, 1903, the appeal was argued before a Divisional Court composed of MEREDITH, C.J., and MACLAREN, J.A.

*Wallace Nesbitt*, K.C., for the appellants. The question on this appeal was as to the liability of the defendants to pay for the services rendered by the plaintiffs to three men—Menard, Roy and Levac—out of the hospital fund. There was no liability on the defendants' part to pay the plaintiffs anything. There was no contract, express or implied, made by the defendants with the plaintiffs, nor any employment by the defendants of the plaintiffs, to perform the services rendered. The defendants' contract to provide the men with medicine and medical attendance did not enure to the benefit of the plaintiffs. The defendants' mechanical superintendent had no authority to pledge the defendants' credit for the services performed for Menard nor had Dr. Coleman or



McKinnon. Under the circumstances, therefore, the judgment of the learned trial Judge should be reversed, and judgment entered for the defendants.

*Aylesworth, K.C., contra.* The "Hospital Fund" was in its nature a trust fund to be employed for the purposes of providing medicine and medical attendance for those injured. It was a fund made up from the contributions of the men themselves, and therefore it would be properly employed when used in payment of the services rendered here, namely, the providing of medicine and medical attendance. When, therefore, these men were brought to the plaintiffs, under the circumstances, which arose here, there was clearly an implied contract to have the fund employed for the payment of those services. The injuries received by the men were such as necessitated their being taken to the hospital, and the fact of their being taken there by those in the employment, or under the control of the defendants, justified the plaintiffs in assuming that it was done with the defendants' authority, so as to create an implied contract to pay for the services out of the fund.

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September 14. MEREDITH, C.J.:—The claim of the plaintiffs, who are practicing physicians and surgeons having a hospital at Sudbury, is for surgical operations and surgical and medical attendance upon three men, named Menard, Roy, and Levac, who were employed at the works of the defendants, and who were injured while so employed.

Menard was an employee of the defendants; but the other two were not. They were employees of a contractor for the defendants, named McKinnon.

The hospital fund was made up of contributions to it which were retained out of the men's pay, and it was designed to provide medicine and medical attendance for the men when they required it.

McKinnon's men, though not in the employment of the defendants, were, it is admitted, entitled to the benefit of the fund.

The defendants concede that those contributing to the hospital fund were entitled to medicine and medical attendance

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when required, at the expense of the defendants, but they dispute the right of one entitled to the benefit of the fund to procure the required medicine and medical attendance from any physician to whom he may choose to go, and to create thereby an obligation on the defendants' part to the physician employed to pay him for his services. They provide physicians at their works, whose duty it is to give their services to those who are entitled to the benefit of the fund, and to supply them with necessary medicine; and this, they allege, is all they are called upon to do under the terms of the arrangement between them and the men in accordance with which the fund was created and is maintained. .

Menard was brought to the plaintiffs for treatment by the master mechanic in the department of the defendants' works in which Menard was employed, and, according to the testimony of the plaintiff Struthers, said that the defendants would be "good for him."

The other two men were brought by McKinnon, Dr. Coleman, one of the defendants' physicians in charge, accompanying him when Roy was brought.

There is nothing, in my opinion, which entitles the plaintiffs to recover as upon an express or implied retainer or employment of them by the defendants to perform the services which were rendered on the credit of the defendants.

It is not open to question, I think, that no duty rests upon an employer to provide surgical or medical attendance or medicine for an employee who is injured or becomes ill while in his employment, and that an employee who is so injured or becomes ill has no authority, merely by reason of his injury or illness, to pledge the credit of his employer for the payment for the requisite attendance or medicine.

I do not think, admitting that the defendants' mechanical superintendent in the case of Menard assumed to pledge their credit for the services which the plaintiffs performed, that it is shewn that he had any authority to do so, and if that be so, the defendants have incurred no personal liability to the plaintiffs for the services which they rendered in that case. In the other two cases, neither Dr. Coleman nor McKinnon had any authority to pledge the defendants' credit, and it is not pretended

that they assumed to do so, and therefore *a fortiori* the defendants incurred no personal liability in these cases.

One occupying the position of master mechanic in the employment of another has no implied authority to pledge his employer's credit for such services as were performed by the plaintiffs, and there was no evidence that the master mechanic who brought Menard to the plaintiffs had any express authority to do so. The same observations apply to Dr. Coleman; and McKinnon was not an employee of the defendants but a contractor with them.

For the same reasons there was, in my opinion, no liability of the defendants created to pay out of the hospital fund; and, indeed, no such case is made on the pleadings, nor was it made by counsel at the trial.

As far as I gather from the shorthand notes of the observations of the learned Judge at the trial, he appears to have thought that the plaintiffs were entitled to avail themselves of the defendants' contract with Menard, Roy, and Levac, to provide medical attendance and medicine for them, and to recover directly from the defendants for their services what the three men, in his view, were entitled to have applied out of the fund in payment for the services which the plaintiffs had rendered, or possibly, that in view of the nature of the arrangement between the defendants and their employees, the latter had authority to pledge the defendants' credit to the extent of the hospital fund for such services as were performed for them by the plaintiffs.

I am, with respect, unable to agree with this view. There was no privity of contract between the plaintiffs and the defendants, and assuming in favour of the plaintiffs that Menard, Roy, and Levac might have compelled the defendants to repay them the debts which they had respectively incurred to the plaintiffs for the services which they had rendered to them, that gave no right of action to the plaintiffs against the defendants; and I am unable to see how the arrangement which existed between those entitled to the benefit of the fund and the defendants could confer upon either Menard, Roy, or Levac authority to pledge the defendants' credit for the services which the plaintiffs performed for them; and even if their

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arrangement did confer that authority, there is nothing to shew that either of them did pledge or assume to pledge it.

The appeal should, in my opinion, be allowed with costs; and the action, as far as it relates to the \$280, be dismissed with costs.

MACLAREN, J.A., concurred.

G. F. H.

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## [DIVISIONAL COURT.]

THE STANDARD TRADING COMPANY

V.

D. C.  
1903

Oct. 19.

SEYBOLD.

*Security for Costs—Granting Additional—Practice.*

While the practice as to granting additional security for costs has been relaxed in favour of the granting of such security, the plaintiff, however, must not be checked at every stage of the action by security being ordered, dollar for dollar, for all costs incurred, or which might be incurred, without regard to the conduct of the parties.

On the commencement of an action, security to the amount of \$200 was ordered. After the action had proceeded \$300 further security was ordered; and, on a commission to take evidence being issued, a further sum of \$100. On the action coming on for trial, the defendant was granted leave to amend his pleadings; and, on the plaintiff stating that he was not ready to proceed on the amended record, the trial was postponed, the costs of the day being made costs in the cause to the successful party. The defendant then obtained an order from the local Master directing \$600 further security to be given.

On an appeal to a Judge, the order was set aside on the ground that the application for such additional security should have been to the Judge at the trial at the time the postponement was asked for.

THIS was an appeal by the plaintiffs from an order of the Master at Ottawa, allowing defendants' application for increased security for costs.

The appeal was heard before OSLER, J.A., sitting as a Judge in Chambers at Ottawa on the 17th of October, 1903.

*J. T. C. Thompson*, for the appellants.

*C. J. R. Bethune*, for the respondents.

October 19. OSLER, J.A.:—The plaintiffs are a foreign corporation, and, under a præcipe order for security for costs, paid into Court the sum of \$200.

The action was proceeded with, and subsequently an order was made by Mr. Justice MacMahon, approved by a Divisional Court, for the payment into Court of \$300, by way of further security.

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Afterwards a commission was issued to take evidence in New York, and the Master made an order to pay into Court as additional security \$100 more.

The case came down for trial, and the defendant Booth then applied for liberty to amend his pleadings. Leave to amend was granted, and the plaintiffs not being prepared to proceed on the amended record, the trial was adjourned.

The Master has now made another order, staying the proceedings until the plaintiffs shall have paid into Court, or otherwise given further security to the amount of \$600.

This is the order complained of.

From my point of view such an order is wholly unreasonable. I am aware that the practice on the subject of granting additional security has been relaxed by the modern rules; but I do not think it admits of a plaintiff being checked at every stage of the action by ordering security dollar for dollar for all costs incurred, or which by possibility may be incurred, without regard to the conduct of the party. Here it is quite plain that the costs of the trial have been thrown away mainly by reason of the defendants having insisted upon being allowed to amend their pleadings, or having deemed it prudent at the last moment to do so, when the plaintiffs were ready to proceed.

I think it is immaterial that the trial Judge made the costs of the day costs in the cause, unless the Judge at the next trial should otherwise order.

The point is, that the postponement of the trial was really caused by the defendants' amendment. Then, moreover, was the time when all terms, such as the giving of security, should have been discussed.

The trial Judge was in a better position than the Master could be to determine whether the plaintiffs were taking an unreasonable view of the amendment as rendering a postponement necessary, and if the defendants had urged that, notwithstanding the amendment, the trial ought not to be postponed unless the plaintiffs would give additional security, the latter might have reconsidered their position and taken the risk of going on, if the Judge thought they were really not prejudiced by the amendment at that stage, and ought not to be allowed to postpone except upon terms. As it was, the defendants

obtained an indulgence and ought not, in my opinion, to be permitted now to embarrass the plaintiffs by obtaining, what is practically, a fourth order for security for costs.

I have referred to all the cases cited by the Master and counsel, and others also, but see nothing which constrains me to uphold the order, which is discharged, with costs of the application and appeal to be costs in the cause to the plaintiffs in any event.

An appeal by the defendants from the above judgment was argued before a Divisional Court [STREET and BRITTON, J.J.] on the 2nd of November, 1903, and on the conclusion of the argument for the appellants, was dismissed with costs.

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[IN CHAMBERS.]

ROBERT V. CAUGHELL.

1903

Sept. 24.

*Practice—Report on Sale—No Sale for want of Bidders—Confirmation—Appeal—Order of Foreclosure.*

A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from and requires confirmation.

And an order made by a Local Judge confirming such a report, while it was neither confirmed under Con. Rule 769 nor appealed from and granting foreclosure in default of payment, was held to be bad.

THIS was an appeal from an order of the local Judge at St. Thomas, dated 8th of September, 1903, confirming a report on sale before the expiry of the fourteen days provided for in Con. Rule 769.

The appeal was argued in Chambers on the 14th of September, 1903, before FERGUSON, J.

*Edward Meek*, for the appeal.

*F. E. Hodgins*, K.C., contra.

September 24. FERGUSON, J.:—After hearing counsel at much length, and perusing all the authorities cited by them, and

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all others that I have been able to find, having a bearing on the subject, I am of opinion that the report on sale made by the Master at St. Thomas, and dated the 4th day of September, 1903, (though a report that there was no sale for want of bidders), was a report that might have been appealed from, and one that required confirmation.

As to the order professing to confirm this report without a consent, counsel for the respondent did not attempt to support it, admitting—as, I think, rightly—that it was clearly bad.

The order of foreclosure was made on the eighth day of September; and, while the said report was neither confirmed nor appealed from: and I am of the opinion that this order of foreclosure was also clearly bad. As to those two orders, and each of them, the appeal will be allowed, with costs.

I do not think it expedient or proper for me to say anything here, as to the other matters mentioned or referred to in the notice of motion on this appeal. I think I am not called upon to do so.

Appeal allowed as above, with costs.

*Order accordingly.*

G. A. B.

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[IN CHAMBERS].

MOFFAT V. LEONARD.

*Security for Costs—Residing out of Ontario—Con. Rule 1198 (a).*

1903

Sept. 25.

The plaintiff was an agent, resident in Detroit, of a joint stock company carrying on business in Ontario, with its head office at Woodstock, where his wife and family resided. He visited his family once a fortnight, and sometimes once a month, but not, as a rule, for more than a day and a half at a time:—

*Held*, on motion for security for costs under Rule 1198 (a) that the plaintiff under the above circumstances must be held to reside in Ontario.

THIS was a motion by the defendant for security for costs, under Rule 1198 (a), on the ground that the plaintiff resided out of Ontario, and was argued on September 24th, 1903, before Mr. Cartwright, the Master in Chambers.

*C. A. Moss*, for the defendant.

*A. W. Ballantyne*, for the plaintiff.

September 25. THE MASTER IN CHAMBERS:—There was sufficient proof of assets within the jurisdiction to defeat the motion, but I reserved judgment on the question of costs to see if the defendants rightly brought the motion or not.

This depends on whether the plaintiff is resident out of Ontario on the true construction of the undisputed facts.

The plaintiff is manager of a joint stock company carrying on business in Ontario, and having its head office at Woodstock. The plaintiff's wife and family reside in Woodstock. He is agent of the company at Detroit, but visits his family, as is set out in the defendant's affidavit, "once a fortnight and sometimes once a month, which visits generally extend over a Sunday only and not, as a rule, for a longer time than a day and a half."\* The plaintiff does not qualify this any further than by saying he has resided in Woodstock for the past eighteen years and still considers it his fixed place of abode. Neither party was cross-examined.

Applying the decision in *Nesbit v. Galna* (1902), 3 O.L.R. 429, to this case, I think the plaintiff is resident in Ontario.

\*This condition of things had continued for three years and upwards.—  
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There the Master found that the "plaintiff's ordinary place of residence is at his wife's home at St. Clair, in Michigan, and that his residence in Ontario, boarding at an hotel, though for months past, is merely a temporary residence" (*per* Meredith, J., at p. 433.)

The converse is to be found in the present case. It is my opinion that the plaintiff's place of residence is at his wife's home in Woodstock, and that his residence in Detroit is merely temporary. To hold otherwise would render many citizens of Ontario non-resident in such a sense as would require them to give security for costs in any case in which they were plaintiffs (or possibly defendants counterclaiming.) The motion is dismissed; costs in the cause.

A. H. F. L.

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## [IN THE COURT OF APPEAL.]

## REX v. NOEL.

C. A.

1903

Sept. 19.

*Criminal Procedure—Trial—Cross-examination—Right to Re-examine.*

The right to re-examine follows necessarily upon cross-examination, even as to matter elicited during the latter which is both inadmissible and volunteered. Such matter should be expunged at the instance of the cross-examiner if it be desired to avoid re-examination.

THIS was an appeal as on a reserved case from a conviction upon an indictment for shooting with intent to commit murder, brought under the circumstances stated in the judgment, which was argued on September 14th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

*E. E. A. DuVernet*, for the prisoner, referred on the point of right of re-examination to *Maclaren v. Davis* (1890) 6 Times L.R. 372; *Blewett v. Tregonning* (1835), 3 A. & E. 554, 581; *Regina v. St. George* (1840), 9 C. & P. 483, 488; Roscoe's Criminal Evidence, 11th ed. pp. 134-5; Taylor on Evidence, 9th ed., at pp. 974-5, secs. 1474-5.

*J. R. Cartwright*, K.C., for the Crown.

September 19. The judgment of the Court was delivered by MOSS, C. J. O.:—The prisoner was convicted before Meredith, C. J., at the assizes, at Ottawa, in May last, upon an indictment under the provisions of the Criminal Code, for shooting at one Larocque with intent to commit murder, and was sentenced to five years imprisonment in the penitentiary. A motion was made on his behalf to this Court for leave to appeal as on a reserved case, and two objections were taken to the proceedings before and at the trial. The first was as to the construction of the grand and petit juries; and the second was as to the refusal of the learned Chief Justice to allow the prisoner's counsel to re-examine a witness named Pepin, who was called for the prisoner. On June 2nd last the Court gave the desired leave and the case was argued on the first day of the present sittings. As we are of opinion that on the second question the prisoner is entitled to a new

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trial, we do not deal with the first question. It is one that is not likely to arise again, and as it is conceded that the utmost relief that the prisoner is entitled to in any event is a new trial, it is not necessary to deal with it in order to the disposition of this appeal.

On the other branch of the appeal we are of opinion that the prisoner's counsel should have been allowed to re-examine the witness Pepin upon the statement, made by him during cross-examination by counsel for the Crown, of something said by the prosecutor Larocque the day after the alleged shooting, about the prisoner being the person who shot at him. In his testimony at the trial the prosecutor Larocque fixed the time at which the shot was fired as 7.30 o'clock in the evening of Sunday the 1st of March, 1903, and swore that the prisoner was the person who shot at him. Pepin testified in chief that at 7.15 o'clock that evening he had seen the prisoner and conversed with him at the corner of Freel and St. Patrick streets, about three-fourths of a mile from the place where the shot was fired. On cross-examination by counsel for the Crown, in reply to a question what person had he first talked to about seeing the prisoner on the Sunday evening, he said he talked with Larocque. Asked, "When?" he said, "The day after Larocque came to me and said Noel had shot him. I said, 'What time was it?' He said, 'Half-past seven.' I said, 'I saw Noel at the corner of Freel street.'" The counsel for the Crown allowed the matter to rest there. It can scarcely be doubted that the statement so made was likely to produce an impression on the minds of the jury unfavourable to the prisoner, as tending to substantiate the prosecutor's testimony. Prisoner's counsel desired to re-examine with respect to it, but was not allowed to do so on the ground that no foundation had been laid for doing so. Prisoner's counsel submitted that he was entitled to ask the witness on re-examination with regard to what was brought out in cross-examination, but the question was ruled out.

As the evidence stood at that time, we think the re-examination should have been allowed. No doubt what Pepin had stated was in strictness not evidence, but the jury were not aware of that. It had come from him in the course of the



cross-examination, and counsel for the Crown had not asked that it should be struck out; nor were the jury informed that it was not evidence, and that they must disregard it. That being so the prisoner was entitled to get, by further examination, every part of the conversation that related to the statement concerning the prisoner being the person who shot at the prosecutor.

It was argued for the Crown that the witness volunteered the statement, and that in any case it was not evidence. The right to re-examine follows upon the exercise of the right to cross-examine, and even if inadmissible matters are introduced in cross-examination, the right to re-examine remains; and the rule holds good where the witness volunteers the statement. If it was desired to avoid re-examination upon it, it should have been expunged at the instance of the Crown. While it remained as part of the testimony, the right to re-examine upon it also remained. In *Blewett v. Tregcnning*, 3 A. & E. 554, where the point was fully argued, all the Judges agreed that however the evidence came in during the cross-examination, whether voluntarily or in answer to a question by counsel, the other party was entitled to pursue it on re-examination, unless the cross-examining party got it struck out. See also Phipson on Evidence, p. 454.

We cannot judge of the effect that the statement, unqualified by other portions of the same conversation, or by any explanation, may have had on the minds of the jury, nor estimate to what extent it may have prejudiced the prisoner. There was no doubt other evidence as to the identity of the prisoner on which the jury might have convicted without reference to Larocque's evidence on that point, but in view of the way in which the statement came out in Pepin's testimony, and of the discussion on the question of re-examination, the jury were not unlikely to have attached considerable importance to it.

We think, therefore, that there should be a new trial.\*

\*The prisoner was tried again at the September assizes at Ottawa and was acquitted.—REP.

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## [DIVISIONAL COURT.]

D. C.

1903

July 18.

SMALL V. HYTTENRAUCH, ET AL.

CRESSWELL V. HYTTENRAUCH, ET AL.

*Parties—Representation—Con. Rule 200.*

The plaintiff sought an injunction against a musical protective association restraining them from making a member of that body break a contract which he had entered into with the plaintiff, to supply an orchestra to the latter's theatre; and made the president and six other officers or leading members of the Association defendants, as representing the Association:—*Held*, that under Rule 200 the plaintiff was entitled to an order that the said defendants might be sued and authorized to defend on behalf of all the members of the Association.

The plaintiff in the first of these actions, Ambrose J. Small, was the lessee of the Grand Opera House in London, Ontario: the defendants were (1st) seven persons, being officers and leading members of the London Musical Protective Association, which is the local branch of the American Federation of Musicians, the said persons being sued on behalf of themselves and all other members of the London Musical Protective Association, (2nd) The American Federation of Musicians, (3rd) The London Musical Protective Association, and (4th) Joseph Weber, who appeared from the affidavits to be the President of the American Federation of Musicians, and to be a resident of Cincinnati, in the State of Ohio, U.S.

The affidavits and examinations shewed that the questions in this action arose from the following state of things:—One Evans had a contract with the plaintiff during the season of 1901-2 to supply an orchestra for each performance at the Opera House at a fixed price. He and all the members of his orchestra were members of the London Musical Protective Association, and, as such, were also members of the American Federation of Musicians, which is the central organization of all the local musical protective associations in Canada and the United States.

After the season of 1901-2, the local association agreed to raise its rates, and Evans and his orchestra refused to re-engage with the plaintiff at the old rate, but offered to re-engage at

\$13.50 per night, which was the new rate. Thereupon the plaintiff entered into an agreement in writing with one Cresswell, also a member of the local association, to engage him and his orchestra for the season of 1902-3 at the rate of \$13.50 per night, being the same rate as that at which Evans and his orchestra had offered to contract, and being the rate authorized by the local union. Cresswell and his orchestra began to play at the Opera House, but upon each performance at which they played they were hissed and assailed with cries from persons in the gallery. Complaint was made to the local association by some member of Evans' orchestra, or by some one in the interest of that orchestra, that Cresswell and his orchestra had supplanted them, although taking no less than the Union rate of pay. The question then seems to have been referred to the defendant Weber, the President of the American Federation of Musicians at Cincinnati, who rendered his decision that the local organization should protect Evans by demanding of its members not to play for the plaintiff until the wrong done Evans for adhering to the price list should be righted. This decision was made known to Cresswell, who refrained from playing for three or four performances. The plaintiff's solicitors, on October 15th, wrote to Cresswell threatening him with an action for damages if he did not perform his contract, and Cresswell was then allowed to go on playing. Several meetings of the local body were held, at which the question was discussed, and it was finally resolved to request the officers of the central organization to take further action. Then one Carey, who is called the Executive Officer of the 9th District of the American Federation of Musicians, was instructed by Weber, the President, to investigate the matter, which he did, and, upon receiving his report, Weber directed him "to call out the Cresswell orchestra and to inform the members that no member of the American Federation of Labour shall play in Mr. Small's London Theatre until Mr. Evans is reinstated." This order Carey communicated to the secretary of the local association, directing him to consult with the proper officers and see that Weber's instructions were carried out. The secretary of the local association sent Cresswell a copy of Carey's letter, and Cresswell asked that orders should be given him under the signature of the secretary

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or the seal of the association in order that he might be able to have recourse to the association for any damages he might sustain owing to his obeying the order. This was refused, and on December 5th, 1902, an *ex parte* interim injunction was obtained by Small in the present action restraining the defendants from persuading or ordering Cresswell and his orchestra not to perform at the New Grand Opera House.

On December 15th, 1902, the defendant Weber wrote to Cresswell notifying him not to play or furnish an orchestra 'at the London Opera House for the plaintiff. Cresswell answered that he was bound to obey the injunction or be sent to goal. A long correspondence then followed between Weber and Cresswell, in which the former endeavoured, without success, to induce Cresswell to refuse to play for Small. Upon Cresswell's final refusal to obey the directions given by Weber, the latter wrote to the defendant Hyttenrauch\*, directing him to return the charter from the central organization for the formation of the local association, and to wind up the latter body. The charter was at once returned by Hyttenrauch to Weber, and a meeting of the local organization was held, at which it was resolved to dissolve it, and wind it up. The individual defendants in this action are alleged to be leaders in a movement to obtain a new charter for a new London local organization of the American Federation of Musicians, and to have applied for and obtained a promise of a new charter. The defendant Thurley stated, at a meeting on February 10th, 1903, that the object of dissolving the original association and obtaining a new charter was, amongst other things, to exclude Cresswell and the members of his orchestra from membership.

The present action is brought for an injunction restraining the defendants from doing any act to induce Cresswell and his orchestra to break their contract with the plaintiff; and to restrain them from conspiring together for that purpose; and for damages.

The individuals named as defendants have been served personally with the writ of summons except Weber, who has

\*Mr. Hyttenrauch was president of the London Musical Protective Association.—REP.



been served substitutionally under an order allowing such service. On April 16th, 1903, the plaintiff applied to Ferguson, J., in Chambers, for an order authorizing and directing the seven individual defendants, excluding the defendant Weber, to defend the action on behalf of the London Musical Protective Association, and authorizing and directing them and the said Weber to defend the action on behalf of the American Federation of Musicians; and directing that all the members of the said association and federation should be bound by any judgment that might be pronounced herein in the same manner and to the same extent as if they were personally made parties to the action; and also for an order amending the writ of summons and proceedings by setting forth that all the eight individual defendants are sued as well on their own behalf as on behalf of all the other members of the American Federation of Musicians. That application was dismissed, with costs,\* and the plaintiff then brought the present appeal to the Divisional Court.

It came on for argument on June 5th, 1903, before FALCONBRIDGE, C.J.K.B., and STREET and BRITTON, JJ., and was argued along with an appeal, in the action of *Cresswell v. Hyttenrauch* from an order of MACLAREN, J.A., of May 14th, 1903, following the decision of FERGUSON, J., in *Small v. Hyttenrauch*, and dismissing, with costs, a similar motion by the plaintiff for an order under Rule 200, as noted, 2 O.W.R. 447.

The facts upon which the action in *Cresswell v. Hyttenrauch* was based appear from the foregoing statement. It was brought to restrain the defendants, who were practically identical with these in *Small v. Hyttenrauch*, from taking any further steps to dissolve or wind up the London Musical Protective Association, and from proceeding or conspiring together, in fraud of the plaintiff's right, to unlawfully exclude him from membership in that association and in the American Federation of Musicians. As already stated, the plaintiff was a member of the local association, and by reason of such membership he was also a member of the American Federation of Musicians. He refused to break a contract to play for Small at the London Opera

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House for the season of 1902-3, although ordered to do so by the Order to which he belonged. He alleged that, in order to exclude him from membership, the local body went through the form of dissolving itself, with the object of forming a new body, from which he should be excluded, and so deprived of his membership in the federation; and that there was no power to dissolve the body to which he belonged in the manner in which it was attempted, and asked for an injunction.

*J. H. Moss*, for the plaintiffs, contended that he was entitled to the order asked in both cases, though there was a point of distinction in the *Cresswell* case, in that *Cresswell* rested on a proprietary interest, and was not, as *Small* was, merely striving to prevent a tort; that *Metallic Roofing Company of Canada v. Local Union No. 30* (1903), 5 O.L.R. 424, shewed a difference between the associations dealt with in the English cases and those concerned here; that the use of the word "parties" in Rule 200 as contrasted with "persons" in the English O. 16, r. 9, makes no difference, and does not mean that all must be parties on the record; *Temperton v. Russell*, [1893], 1 Q.B. 435, proceeds on the ground that the rule is confined to cases of an equitable nature, and where the defendants have a proprietary interest; that it was disapproved of in *Duke of Bedford v. Ellis*, [1901] A.C. 1; and that the sole test is whether the parties have the same interest. He also referred to *The Taff Vale R.W. Co. v. The Amalgamated Society of Railway Servants*, [1901] A.C. 426, 438, 442; and *Wood v. McCarthy*, [1893] 1 Q.B. 775.

*J. G. O'Donoghue*, for the individual defendants, except *Weber*, contended that the use of the word "parties" in Rule 200, gives it a narrower scope than that of the English rule; that all interested should first be made parties, and then the application made; that there is no authority for making the order asked in such cases as the present: *Murray v. Clapp* (1897), 33 C.L.J. 771; *Temperton v. Russell*, [1893] 1 Q.B. 435; that *Duke of Bedford v. Ellis*, [1899] 1 Ch. 494, [1901] A.C. 1, see at pp. 10, 18, had not affected the decision in *Temperton v. Russell* that a representative order is not applicable to a tort action; that, assuming a contractual relation in the *Cresswell* case, as a member of an illegal association he could not come

to this Court at all: *Cullen v. Elwin* (1903), 19 Times L.R. 426; *Rigby v. Connol* (1880), 14 Ch.D. 482; *Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605; and that Cresswell should have first exhausted the remedies he had in the domestic forum under the constitution and by-laws of his Order. He also referred to *Linaker v. Pilcher* (1901), 84 L.T. 421, at p. 426: *The Taff Vale R.W. Co. v. The Amalgamated Society of R.W. Servants*, [1901] 1 Q.B. 170, at p. 173.

*Moss*, in reply, contended that objections as to remedies of the domestic forum not having been exhausted, and as to the illegality of the Association, were proper for the trial; and that it was idle to talk of suing all the members of associations such as those here in question, where members were constantly dropping out, and there would have to be a succession of applications for order of revivor on abatement.

July 18. STREET, J., [After stating the facts as above:—] Our Rule 200 provides that "In an action where there are numerous parties having the same interest, one or more of such parties may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all parties so interested."

The corresponding English rule is in the same language, except that the word "persons" is always used where our rule uses the word "parties." The meaning attached to the rule, however, has been to treat the word "parties" as equivalent to "persons," and to construe it accordingly: *Smith v. Doyle* (1879), 4 A.R. 471.

In *Temperton v. Russell*, [1893] 1 Q.B. 435, it was laid down by the Court of Appeal in England that the operation of the rule should be confined to cases in which the interest of the numerous parties to be bound was a beneficial proprietary interest. This view, however, was distinctly overruled by the House of Lords in *The Taff Vale R. W. Co. v. The Amalgamated Society of Railway Servants*, [1901] A.C. 426. Lord Lindley in that case refers to his own judgment in *Temperton v. Russell*, in which he had taken part as Lord Justice, as containing some unfortunate observations upon the rule in question, which had been happily corrected in *Duke of Bedford*

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v. *Ellis*, [1901] A.C. 1, and in the course of the argument of the *Taff Vale* case. He adds, at p. 443, "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed."

The matters complained of in the *Taff Vale* case were sufficiently similar in character to those complained of in the present case to make these remarks distinctly applicable here. It has been decided by a Divisional Court here in the case of *The Metallic Roofing Co. of Canada v. Local Union No. 30*, 5 O.L.R. 424, that the difference between the status of a trades union here and in England is such as to render the *Taff Vale* case inapplicable to trades unions here, and that, therefore, organizations such as the London Musical Protective Association cannot be sued under their collective name. It is evident, however, from the affidavits and examinations before us, that a number of persons, seven of whom are defendants in the present action, are bound together by a set of rules by which they are in the habit of considering themselves governed; that they annually elect officers, who are an executive committee or board to act on behalf of the whole body of members; that they have a treasurer, to whom they pay regular contributions for the purposes of carrying out the purposes of the association, and that they hold meetings, at which the majority of votes cast by the members present determines the action of the executive committee on behalf of the whole body. The plaintiff's complaint in the present case seems to be that the members of the London Musical Protective Association, at meetings of the whole association, and by their duly authorized agents, the executive committee of the association, have agreed with one another, and with Weber, the president of the central body at Cincinnati, Ohio, to order Cresswell and his orchestra to break the contract existing between them and the plaintiff, and he asks for an injunction to restrain them from carrying out this design. The persons made defendants as representing the London Musical Protective Association are the President Hyttenrauch, and three



other members of the executive committee, one of whom is the treasurer, and was the acting secretary at the time the charter was returned, and three other members who appear to have taken a specially active part in the matter in question, or to be specially interested in it. So far as the local body is concerned, which does not appear to comprise more than 60 persons, I am of opinion that the persons selected to represent it are properly qualified to do so: they form, in fact, as I understand, the rules of the association, the majority of the persons elected by the members of the association to represent them as an executive committee, along with other members specially interested in the matter. I think it would have been better to have had all the members of the executive committee joined as defendants, but there may have been difficulty in ascertaining their names: and the objection made by the defendants upon the argument was not based upon this ground, but upon the broad principle that no representation was permissible in a case of this nature.

I am of opinion, therefore, that the case is brought within Rule 200 by the fact that the members of the London Musical Protective Association are a numerous body of persons who, with the exception of Cresswell and his orchestra, are acting in the same interest, through their executive committee, viz., to compel Cresswell to break his contract with the plaintiff in order that what they understand to be principles of their organization may be sustained.

It is further asked, however, that these same defendants, and the defendant Weber, may be directed to defend on behalf of the American Federation of Musicians, which is the whole body in Canada and the United States, made up of the numerous local organizations, and comprises, it is said, many thousands of members both here and all over the United States. It is essentially a foreign body, having its headquarters in Cincinnati, Ohio, where its executive committee meet, although the members of its branches in Canada are *ipso facto* members of the federation. The persons who form the executive committee are few in number, and are the only persons whose acts affect local organizations in Canada, and in a proper case they might be made parties if it should become necessary. But I do not think that a case has been made out justifying us in treating the

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defendant Weber, who is the president, as sufficiently representing the whole of the local organizations wherever situate, nor do I see the necessity for our making all the members of these associations parties to this action, which is what is asked for. In my opinion, therefore, this part of the order asked for should be refused, and only that part of it should be granted which directs that the individual defendants other than Weber may be sued and authorized to defend on behalf of all the members of the London Musical Protective Association other than Cresswell and the members of his orchestra (naming them).

The order of my brother Ferguson should, therefore, in my opinion, be varied to the extent necessary to carry these views into effect: and, as the success has been divided, there should be no costs of the motion to him or of the present appeal.

It was objected by the defendants that the question at issue between the plaintiff and the defendants is one which must be determined by the tribunal appointed by the rules of the order, and that it is not the habit of the Courts to interfere until recourse has been had to them. It may very possibly appear, when the parties are brought before the Court, that this is the case, but to determine that question now would be to try the case, which we should not do upon a mere question of adding parties.

I have gone fully into the question raised under Rule 200 in *Small v. Hyttenrauch*, which was argued before us with *Cresswell v. Hyttenrauch*, and I think the same order should be made in the present case, except that the defendants who are parties to this action should be sued as representing the members of the London Musical Protective Association other than the plaintiff Cresswell; and there should be no costs here or below.

FALCONBRIDGE, C.J. I concur in the above judgment. Mr. O'Donoghue's contention that the association and federation sued are illegal associations, whose members cannot represent each other, is dealt with by my brother MacMahon in *Parker v. Toronto Musical Protective Association* (1900), 32 O.R. 305, and by the same learned judge in his judgment in the Cresswell case handed out to-day.

BRITTON, J., also concurred.

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[MEREDITH, J.]

## IN RE BRADLEY'S ESTATE.

1903

July 31.

*Devolution of Estates Act—Sale of Land by Administrator—Non-concurring Adult Heirs—Approval of Official Guardian—R.S.O. 1897, ch. 127, sec. 16.*

An administrator desired to sell certain lands pursuant to his powers under section 16 of the Devolution of Estates Act, R.S.O. 1897, ch. 127. There were certain heirs who were *sui juris*, but whose concurrence in the sale had not been sought or obtained because of the delay and expense which would be involved in so doing:—

*Held*, that, nevertheless, it was proper for the official guardian to approve of the sale, pursuant to his powers so to do under that section, if, after he had made the usual enquiries as in a case of infant heirs or devisees, no good reasons were advanced or discovered for his refusing to do so.

THIS was an application under Con. Rule 972, for a direction to the official guardian under sec. 16 of the Devolution of Estates Act, as amended by 63 Vict., ch. 17, sec. 17, (O.), to approve of a sale of lands by an administrator, though there were non-concurring adult heirs.

The motion was heard at the Weekly Court at London, on June 13th, 1903, before MEREDITH, J.

*T. G. Meredith*, K.C., for the applicant.

*F. W. Harcourt*, as Official Guardian.

July 31. MEREDITH, J.:—The applicant desires a direction to the official guardian, to approve of a sale of certain lands, made by the applicant as administrator of his deceased brother's estate.

The heirs-at-law are brothers and sisters, and nephews and nieces, and none of them is under any disability, but some of them are not easily accessible.

The sale was made for the purpose of distributing the estate; there are practically no debts.

The approval appears to be required by sec. 16 of "The Devolution of Estates Act," as amended by 63 Vict. ch. 17, sec. 17 (O.). Sec. 16 gives to executors and administrators full power

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to sell, but subject to the restriction that, where infants or lunatics are beneficially entitled as heirs or devisees, or where other heirs or devisees do not concur in the sale, it shall not be valid as respects such infants, lunatics, or non-concurring heirs or devisees, without the approval of the official guardian. That is to say, where there are heirs or devisees not competent to concur, or where there are heirs or devisees competent to concur but who do not, the approval must be had.

This case is within the latter category. All the heirs are competent to concur, but all have not concurred, in the sale. There is not said to be any expressed objection to it by any of them; it is rather a case in which the concurrence of all has not yet been sought, because of the delay and expense which that would cause; and if concurrence can be satisfactorily obtained and shewn only by execution of the conveyance, it is a case in which considerable delay and expense must be occasioned if the official guardian do not intervene.

The Act was certainly intended to facilitate the sale and conveyance of lands of deceased persons; but that object will be defeated if the provisions in respect of such sales are to be worked out in such a manner that practically no conveyances can be made, in such a case as this, without all the heirs joining in it. That would be throwing the matter back to the condition of affairs existing before the passing of the Act, with the additional burden of having the administrator a necessary party, and would bring into operation again the costly process of sale and distribution under partition proceedings, if they are now available. The amendments to the Act contained in sec. 16, and in sec. 17, 63 Vict., ch. 17, (O.), were long retrogressive strides, but were not intended to, and did not, entirely subvert the purpose and effect of the main enactment in respect of the legal representative's rights in, and power over, the deceased's real estate.

Ordinarily, it is the right of each of the heirs, and in the interest of all of them, to have the lands sold and the proceeds distributed as speedily and as inexpensively as possible. Care should be taken that the best price obtainable is obtained, that the persons concerned should have notice of the sale, under ordinary circumstances, and that those of them who are entitled



and desire to bid should have opportunity for doing so; and also that no risk which can be avoided should be run of any loss of the purchase money or the shares of the heirs.

On the one side it is said that the official guardian declines to act in the matter until all the heirs or devisees have been requested to join in the conveyance and some of them have refused to do so. That would not be a reasonable position to take, but, under ordinary circumstances, it would not be unreasonable for the official guardian to require the executor or administrator to first communicate with those devisees or heirs who could be reached by the ordinary means of communication, when no danger would be incurred by the delay.

On the other hand it is said that the practice of the official guardian is to obtain the names and addresses of non-concurring heirs or devisees, and to communicate with them upon the subject, and then to exercise his judgment, or, if in doubt, to apply to a Judge in Chambers, a practice which is quite reasonable if it do not require, in the first instance, in all cases, the expense and delay of an effort on the part of the executor or administrator to procure the execution of the conveyance by all of the devisees or heirs.

"Non-concurring" does not mean, though it may include, objecting heirs or devisees; nor does it necessarily import notice of the sale. The section is now applicable where there are debts as well as where there are none. Ordinarily, and especially when the sale is merely for the purpose of distribution, it would be only reasonable to require notice of the intended sale to be given to all of the heirs or devisees who are reasonably accessible. But care must be taken to avoid making the transmission of such real estate more hampered and more costly than before the passing of the Act.

In the facts of this particular case, the proper course to be now pursued is, for the official guardian to make the usual inquiries, and if no good reasons are advanced or discovered for withholding his approval it should be given. That is what the section expressly requires; he "shall have the same powers and duties as he has in the case of infants."

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Section 16 does not, as sec. 8 does, provide for an order of the Court, authorizing the sale in the absence of the official guardian's approval or consent, but Rule 972 provides for an application to a Judge in Chambers for such direction or order touching such real estate, and the proceeds thereof, as to the Judge may seem meet.

The costs of the application will be paid out of the estate.

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[IN THE COURT OF APPEAL.]

## SKILLINGS V. ROYAL INSURANCE COMPANY.

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Sept. 14.

*Insurance—Fire Insurance—Cancellation—R.S.O., 1897, ch. 203—Statutory Condition 19 (a)—Notice of Cancellation Received after Loss.*

The insured sent to the company his policy with an indorsed surrender clause, executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire :—

*Held*, that the letter did not take effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt, that the attempted surrender did not operate, and therefore the company was liable for the loss.

Judgment of Lount, J., 4 O.L.R. 123, affirmed.

THIS was an appeal by the defendants from the judgment of Lount, J., reported 4 O.L.R. 123, where the facts are fully stated.

The appeal was argued on April 18th, 1903, before Moss, C.J.O., MACLENNAN, GARROW, and MACLAREN, JJ.A.

*Christopher Robinson*, K.C., and *C. S. MacInnes* for the appeal. The defendants' rights in this action do not rest on statutory condition 19 (a) of the Ontario Insurance Act. That condition gave the plaintiffs the right to a rebate on their premium; but the plaintiffs had a common law right to cancel the policy, and that right they exercised when they signed the surrender. The words used were, "which is hereby cancelled and surrendered:" Eng. Ency. of Law, vol. 2, p. 212: *The President, etc., of the Bank of Upper Canada v. Widmer* (1832), 2 O.S. 222, at p. 239; *Harrison v. Owen* (1738), 1 Atk. 520; *Taylor v. Manners* (1865), L.R. 1 Ch. 48; Pothier on Obligations, Vol. I., pp. 402-403; *Beach v. Endress* (1868), 51 Barb. (N.Y.) 570; 7 Comyns Dig. 222. When the policy left the custody of the plaintiffs, it had been surrendered, and the posting of the letter enclosing it passed the property in it to the defendants; R.S.C. 1886, ch. 35 sec. 43. Even if that were not so, and the directions in the letter governed, the policy expired at noon of June the 5th, and the fire did not commence until late that night.

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The intention was evident, and must govern: *Miall & Co. v. The Western Insurance Co.* (1868), 19 C.P. 270, at p. 276. The plaintiffs could not have recalled the policy if no fire had occurred. There was further insurance here with other companies: *Atlantic Insurance Co. v. Goodall* (1857), 35 New Ham. 328, at p. 336; *Crown Point Iron Co. v. Aetna Insurance Co.*, (1889) 53, N.Y. (Hun) 220, at p. 227, and in such cases it is of the utmost importance to an insurer to know that the cancellation has been effective.

*Riddell*, K.C., and *Alex. Fasken*, contra. When a statute provides a course to be followed, that does away with the common law right. No doubt the plaintiffs had the right at common law to put an end to the policy when they chose and lose the premium rebate, but that was not their intention, as what they did was a proposed surrender under condition 19 (a) and a claim of the rebate, and their letter made that plain. It matters not where the policy happens to be: *Caldwell v. The Stadacona Fire and Life Insurance Co.* (1882), 11 S.C.R. 212. No estoppel arises against the plaintiffs from what was done: Am. and Eng. Ency. of Law, 2nd ed., Vol. 23, under "Receipts." Even if the policy expired on June 5th, it was not until the last minute of that day. The notice was not regular nor sufficient; *Goodwin v. The Lancashire Fire and Life Insurance Co.* (1873), 18 L. C. Jur., 1. We refer also to *Canning v. Farquhar* (1886), 16 Q. B. D. 727; *Xenos v. Wickham* (1866), 2 H.L.C. 296; *Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.*, and *Agricultural Savings and Loan Co. v. Alliance Assurance Co.* (1901), 3 O.L.R. 127.

*Robinson*, in reply. Even if the plaintiffs have failed to cancel under the statute, they may cancel at common law and lose their right to recover on the policy. The right of immediate cancellation may be of infinitely more importance than the recovery of a small amount of rebate.

September 14. MACLENNAN, J.A.:—I am of opinion that the judgment should be affirmed.

No doubt the plaintiffs could have cancelled the policy wholly without reference to the company. It was their



property, and they could do what they pleased with it, and neither the defendants nor any one else could have complained. In that case, however, they could make no claim for return of premium until they had conformed to the statutory condition of the policy, 19 (a), by giving notice. It is evident that the plaintiffs did not intend to cancel without reference to the company, but intended to act upon and to avail themselves of the condition, and to obtain a return of a proportion of the premium which they had paid.

The condition declares that the insurance may be terminated by *giving written notice* to that effect to the company, or its authorized agent, in which case the company shall repay to the assured the premium paid, less the usual short rate. There is no direction as to how the notice is to be given, whether by post or otherwise, but a written notice must be given to the company or its authorized agent, and the giving of that written notice is what constitutes the cancellation. Although the notice was mailed on the 30th of May for a cancellation on the 5th of June, it did not reach the agent until the 6th, and therefore was not *given* until the later day, and could have no earlier effect. By that time the fire had occurred, and the plaintiffs had suffered the loss for which they sue.

It was argued that sec. 43 of the Post Office Act, R.S.C. 1886, ch. 35, which declares that the property in letters and other things sent by post ceases to be the property of the sender and becomes the property of the person addressed, from the time of posting, made the posting a legal delivery of the notice, and put an end to the plaintiff's right and title in the policy. I do not think that contention can prevail. An actual delivery of notice is evidently what the statutory condition intends; and the section of the Postal Act was not intended to alter the actual rights of the sender and the person addressed, as between themselves.

I therefore think that the insurance was not terminated before the loss, and the judgment in favour of the plaintiffs must be affirmed.

GARROW, J.A.:—The action is upon an insurance policy, dated 24th January, 1901, to run for one year from the hour of

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noon of the 21st January, 1901, for \$10,000, at the premium of \$165, paid in cash on the delivery of the policy.

The property covered by the policy, which consisted of lumber, was destroyed by fire on the night of June 5th, 1901, and the material question in dispute is whether the policy was on foot when the loss occurred, or whether it had been cancelled and surrendered by a written request from the assured to cancel, sent by mail before, but not received by the defendants until after the fire.

The facts are fully stated in the former report of the case, and it is therefore unnecessary to repeat them here.

An argument addressed to us by the learned counsel for the defendants, apparently for the first time, or, at all events, not referred to in the judgment as reported, was that the plaintiffs had, in addition to the statutory right of surrender and cancellation, a similar common law right; and that if they had not well executed their statutory right they had at least executed the alleged common law right by executing and mailing the written surrender and cancellation on May 30th. But, granting the common law right to disclaim and renounce at any time a benefit which is unaccompanied by any corresponding burden or duty, it seems a complete answer to say that, as a matter of fact, there is no evidence upon which to found such an argument.

There was no absolute cancellation and surrender on May 30th. What was done on that day was, at most, conditional, or, in other words, preparatory to a desired cancellation to take place on June 5th. The endorsement must be read with the letter which accompanied it, in which the plaintiffs say, "We desire to cancel as of June 5th."

It would, it appears to me, be a wholly unwarrantable liberty to take both with the documents, and the plain intention, to read the endorsement itself as amounting to an immediate cancellation as of May 30th. It is quite apparent that the plaintiffs intended to continue to be insured under the policy until June 5th, and equally apparent, that from that date they intended to claim a refund of the unearned premium, a right which could not have been claimed except under the statute.

And this was the view of the defendants themselves when framing their statement of defence; that is, that the plaintiffs were proceeding, in what they did, under the statutory conditions, and not in the assertion of any common law right.

The real question must therefore, I think, continue to be, did what took place amount to a statutory surrender and cancellation at the instance of the insured, so as to put an end to the policy before the fire, a question which has been answered, I think properly, in the negative, by the learned Judge at the trial in a careful and well reasoned judgment, which, in my opinion, leaves very little to be usefully said.

This case is not, in my opinion, to be distinguished from the case of *The Crown Point Iron Co. v. The Aetna Insurance Co.* (1891), in 127 N.Y. (Sickels) 608, a unanimous judgment of the State Court of Appeal, reversing the considered judgment of the State Supreme Court, and, therefore, a decision under the circumstances of high authority, although not, of course, binding upon this Court, where it was held that the insurance company, under a state of facts, not unlike those in the present case, must prove that the notice to cancel was received by the company before the fire; and that a notice sent before, but not received until after the fire, was wholly ineffectual, the rights of the parties having under the contract been vitally altered by the intervening fire.

I adopt this view of the law as sound. Giving such a notice is wholly the voluntary act, and for the exclusive benefit of the insured. So long as it rests in intention, the insurer has no power or control over the matter whatever. The notice may be recalled up to the last moment before it reaches its statutory home in the hands of the insurance company, and what is equivalent to a recall may be accomplished by indirect, as well as by direct interference on the part of the insured, as in this case, by an erroneous address upon the letter intended for the defendants, but retarding its delivery.

I think the appeal fails, and should be dismissed, with costs.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

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[FALCONBRIDGE, C.J.K.B.]

1903

## KINGSTON V. THE SALVATION ARMY.

Oct. 7.

*Parties—Unincorporated Association—Salvation Army.*

The Salvation Army is an unincorporated religious society, and an action cannot be maintained against it for torts committed by its officers. The judgment in this action on the motion to set aside the writ, reported 5 O.L.R. 585, considered and not followed.

ACTION, tried at Hamilton on the 7th of October, 1903, before FALCONBRIDGE, C.J.K.B., and a jury, to recover damages for injuries sustained through the running away of a horse frightened by noise made by the defendants McQuarrie and Austin, while conducting religious services as members of the Salvation Army, the defendants, in a street in the city of Hamilton.

*D'Arcy Tate*, for the plaintiffs.

*A. Hoskin*, K.C., and *G. Lynch-Staunton*, K.C., for the defendants.

At the close of the plaintiff's case the defendants moved for a nonsuit and at the conclusion of the argument the following judgment was given:—

The Salvation Army may be aptly described as an unincorporated religious community or society, not seeking any recognition under the law at all, so far at least as concerns property which may be held by the head of the society or the heads of the community.

There have been filed the declarations of General William Booth, who is the supreme commanding officer, and of the commissioner in this Province, Miss Evangeline Booth. The declaration of General William Booth, which bears date 1884, recites that in 1865 he commenced preaching the Gospel; that a number of people were formed into a community or society by him; that at first this society was known by certain other names; that other societies were afterwards formed; that divers leases, meeting-houses, lands, etc., were given and conveyed to certain persons upon the trusts therein mentioned:



that the labours of the Salvation Army have been extended to the Dominion of Canada; that it is the intention and purpose of the said William Booth to make numerous further purchases of lands in the Dominion of Canada. And then, after those recitals, William Booth declares, first, that the name and style of the society shall be "The Salvation Army." Then follows a creed or confession of faith. Then there is the declaration that the Army is and shall be always under the oversight of some one person under the title of "General"; that he shall have power to expend on behalf of the Army all moneys contributed for the general purposes thereof; that he shall have power to acquire in any or all of the Provinces of the Dominion of Canada by gift, purchase, etc., buildings and lands; that he may in all cases in which he shall deem it expedient so to do nominate and appoint trustees or a trustee of any part or parts respectively of such property, and draw or make the conveyance or transfer to such trustees, with power to himself, or to the general for the time being, to declare the trusts thereof; and full right and power reserved to William Booth to mortgage, lease, let, or hire; that he shall continue to be the general and supreme officer; that he and every general who shall succeed him shall have power to appoint his successor to the office; that it shall be the duty of every general to make a memorandum naming his successor, or giving directions as to the means which may be used to appoint a successor; then reciting again that he is now negotiating for the purchase in the Dominion of certain freehold lands, it is now declared by the said William Booth, that all lands whatsoever purchased or acquired by him and now vested in him shall and will be held by him, and the general for the time being of the Army, in accordance with the tenor, drift, meaning, and intent of these presents; and then he reserves the right to nominate and appoint such persons as he shall think fit to be officers in the Army, and to make powers of attorney, etc. Now that is the whole declaration of trust contained in that instrument.

Then, by deed bearing date the 7th of August, 1896, made between Evangeline Cora Booth and the general, after reciting this deed poll which I have just referred to, and reciting further that Evangeline Cora Booth has, on the nomination of

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the said William Booth, been appointed an officer of the Salvation Army to direct the operations of the Army in Canada, and has, at the instance and with the approval of the said William Booth, purchased and acquired in her own name by transfer from Robert Henry Booth, her predecessor in said office, and otherwise as may be hereafter purchased and acquired, lands, buildings, etc., and further reciting a request by William Booth to execute a declaration, this indenture witnesseth that the said Evangeline Cora Booth does hereby irrevocably admit and declare that she and her heirs will stand possessed of all lands, buildings, etc., acquired, devised, and bequeathed to her while she was so acting or supposed to be acting as such officer, upon trust for the said William Booth, his heirs, executors, administrators, and assigns, or other the general for the time being of the Salvation Army, and to convey, assign, or surrender or otherwise dispose of the same, as such general shall from time to time direct. She further declares that any real or personal property whatsoever acquired by her shall, until she has conclusively established the contrary to the satisfaction of the said William Booth or other general, be deemed to belong to her as an officer of the said Army, and upon trust for the said William Booth or his successors. Then there is a provision that she shall have the power, so long as he shall not have revoked these powers, to sell, mortgage, and lease, and otherwise deal with the property.

Now, that is the position of the Salvation Army with reference to the holding of property in this country.

Then the only instance in which recognition has at all been sought from or given by Parliament is in R.S.O. 1897, ch. 162, which is an "Act respecting the Solemnization of Marriage," and which provides (sec. 2, clause 3) that, "any duly appointed commissioner or staff officer of the religious society called the Salvation Army, chosen or commissioned by the said society to solemnize marriages," may legally do so.

Both parties have invoked the celebrated *Taff Vale* case, and both parties have agreed that upon the principles laid down in that case this judgment must pass. That is a case which was decided by the House of Lords (*Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426),

in which the judgment of Mr. Justice Farwell, after an intervening adverse decision, was affirmed, and their Lordships of the House of Lords refer to the judgment of the original trial Judge, Mr. Justice Farwell, with approval.

Now, it has been pressed upon me on behalf of the defendants that there are great distinctions between the *Taff Vale* case and this. The *Taff Vale* case was what is commonly known as a trades union case, and it is pointed out that there the trades union was registered under the Act, and was given the capacity of owning property and acting by agents. These elements appear to be absent in this case. I refer to the language of Mr. Justice Farwell: "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents." Further on he says: "The real question is whether, on the true construction of the Trade Union Acts the Legislature has legalized an association which can own property and can act by agents by intervening in labour disputes between employers and employees, but which cannot be sued in tort in respect of such acts." And he goes on to say that, "the Legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation, essential in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property."

Now, are these defendants, the Army, within the purview of the Act respecting the Property of Religious Institutions? That is R.S.O. 1897, ch. 307, which provides (sec. 1 (1)) that, "where any religious society or congregation of Christians in Ontario desires to take a conveyance of land for the site of a church, etc., or for any other religious or congregational purposes whatever, such society or congregation may appoint

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trustees, to whom, and their successors, to be appointed in such manner as may be specified in the deed of conveyance, the land requisite for all or any of the purposes aforesaid may be conveyed; and such trustees and their successors in perpetual succession, by the name expressed in the deed, may take, hold, and possess the land, and maintain and defend actions for the protection thereof, and of their property therein."

I have grave doubt whether this community is within the meaning of that Act; but, if it were so, I should find it difficult to hold the whole society or organization liable, as they are sought to be held here. The trustees are the corporation under that Act, not the congregation nor the church at large. It has been argued that the expression of the capacity to do something, namely, to hold and possess land and maintain and defend actions for the protection thereof, means the exclusion of the capacity to sue or be sued for wrongs or torts. However that may be, I do not think that the Act is applicable so as to hold the whole society answerable in tort.

Now, there have been various decisions in our own Courts which, I think, point in the same direction. I refer more particularly to the case of *Metallic Roofing Company of Canada v. Local Union No. 30* (1903) 5 O.L.R. 424, also a trades union case, and I think the spirit and meaning of the judgment of the Divisional Court in that case are in accord with the judgment which I am about to pronounce in this. I do not overlook the fact that my learned brother Britton has, upon an interlocutory application in this case, 5 O.L.R. 585, seemed to express a different view; but I am, sitting here, obliged to follow what I consider to be judgments binding upon me. Probably if his judgment be read very closely, it does not go so far as to express an opinion which goes to the root of the matter here.

Now here I do not find, even if there is a recognition by the Legislature, in the way in which I have mentioned, authorizing certain officers to perform the ceremony of marriage, that there is anything analogous to the power which was conferred by the Legislature in England upon trades unions; and further, I do not find that there is any secondary object; there is no commercial object in this. It is quite true that it has been pointed out that the society, or some one for the Army, owns a farm and



a newspaper, but I am not told that these are conducted in any spirit of commercial enterprise, or for any particular commercial purpose.

Upon the whole I have a very clear opinion that the objections to the maintenance of this action are well founded and must prevail. It is not necessary for me, in that view, to express any opinion upon the merits of the main case.

I am inclined to think, although I do not so expressly decide, that I should have let the case go to the jury to determine whether or not what took place upon the evening in question did or did not constitute a nuisance or act of neglect on the part of some person or persons. It may be that the remedy of these plaintiffs, if they have any, is against the individual members of the immediate circle of people who were conducting the services upon that evening. Upon that, also, it is not necessary now to express an opinion; but upon the whole, without any hesitation, I have to withdraw the case from the jury, and dismiss the action.

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POSTLETHWAITE V. McWHINNEY.

Oct. 13.

*Jurisdiction—Service out of Jurisdiction—Parties—Injunction—Con. Rule 162.*

An order allowing service of a writ out of the jurisdiction cannot be supported under clause (f) of Con. Rule 162 unless the injunction can properly be asked as against the defendant out of the jurisdiction sought to be served. In proceedings under clause (g) of Con. Rule 162, the defendant within the jurisdiction should be served with the writ and then an order applied for for leave to serve the defendant resident out of the jurisdiction with a concurrent writ, and failure to proceed in this way is not such an irregularity merely as can be condoned.

*Collins v. North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228, followed. *Livingstone v. Sibbald* (1893), 15 P.R. 315; *McKay v. Colonial Investment and Loan Co.* (1902), 4 O.L.R. 571, and *Re Jones v. Bissonnette* (1902), 3 O.L.R. 54, considered.

Appeal by the defendant Sarah Ann Postlethwaite from an order of the Master in Chambers refusing an application to set aside the service upon her of the writ of summons.

The plaintiff was the husband of the defendant Sarah Ann Postlethwaite, to whom he was married in England in the year 1878. On the 22nd of August, 1883, they entered into a separation agreement, under seal, by which he agreed to pay to a trustee for her a weekly sum so long as they should live apart and she should continue to lead a chaste life. The plaintiff came to Canada and the wife remained in England. In the year 1900 a new separation agreement, under seal, was drawn up and executed by the husband and wife and the former trustee, and by the defendant McWhinney, a solicitor in Toronto, who had agreed to act as a trustee for the wife in place of the former trustee. Under the new agreement the plaintiff agreed to pay to the defendant McWhinney, as trustee for the wife, \$15 a month. The payments being in arrear, an action in the 10th division court of Toronto, was brought by McWhinney against the plaintiff to recover them. Thereupon the plaintiff brought the present action to set aside the agreement on the ground that it had been obtained by fraud. The writ of the summons, and a concurrent writ for service out of the jurisdiction, were issued on the 25th of June, 1903, an order for leave to serve the defendant Sarah Ann Postlethwaite as a

British subject out of the jurisdiction having been obtained on the 24th of June, 1903. The writ for service within the jurisdiction was served on the defendant McWhinney on the 8th of July, 1903, and the concurrent writ on the defendant Sarah Ann Postlethwaite on the 11th of August, 1903. The statement of claim served with the latter claimed an injunction to restrain the defendants from proceeding with the pending action in the division court.

On the 29th of June, 1903, upon the application of the present plaintiff, the defendant in the action in the division court, an order was made by the Judge of that court staying proceedings in that action until after the trial and final disposition of the present action to set aside the separation agreement.

The defendant Sarah Ann Postlethwaite, upon being served with the concurrent writ and statement of claim, applied to the Master in Chambers, upon notice to the plaintiff, to set aside the issue and service of the writ and statement of claim upon her and the order allowing the same, upon the ground that the material upon which the order was made was insufficient, and upon the further ground that the case was not within the provisions of Rule 162. The learned Master on the 26th of September, 1903, refused the application.

The defendant Sarah Ann Postlethwaite appealed against this judgment, and the appeal was argued before STREET, J., in Chambers, on the 9th of October, 1903.

*S. B. Woods*, for the appellant.

*R. B. Beaumont*, for the plaintiff.

October 13. STREET, J. (after stating the facts):—The learned Master is of opinion that the order giving leave to serve Mrs. Postlethwaite out of the jurisdiction was properly made under sub-sec. (f) of Rule 162, which provides that such an order may be made when “an injunction is sought as to anything done or to be done within Ontario.” The affidavit upon which the order was granted makes no case for an injunction, and does not even mention the fact that McWhinney had brought an action in the division court. The writ, when issued, was endorsed with the usual statement

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that "the plaintiff's claim is to set aside and have cancelled and declared null and void a certain agreement between the parties hereto of the 31st day of March, 1900." The statement of claim, it is true, alleges that McWhinney, as trustee for Mrs. Postlethwaite, had brought an action in the 10th division court of York to recover certain monthly payments in arrear under the agreement, and prays for an injunction to restrain both defendants from taking any proceedings upon the agreement. But, as I have said, no such claim is covered by the affidavit on which the order was made, and it is upon that affidavit that the order must be justified. Again, I do not think an injunction against McWhinney either a necessary or a proper remedy under the circumstances. The division court clearly had jurisdiction to entertain the claim for arrears under the separation agreement; McWhinney had a clear right to bring his action there, and the plaintiff might set up as a defence there the facts upon which he relies as a ground for setting aside the whole agreement. The proper remedy seems to be that which he took, and which he seems to have had no difficulty in obtaining, viz., an application to the discretion of the Judge presiding in the division court to stay proceedings there pending the present action. There is a further reason why sub-sec. (f) of Rule 162 should not, in my opinion, be taken to assist the plaintiff, and it is this: The covenant in the separation agreement by the plaintiff is to pay to McWhinney the monthly allowance; it is paid to him, it is true, as trustee for Mrs. Postlethwaite, but the action upon it can only be brought by McWhinney, and not by her, so that the injunction, if it could be properly granted, should only be against him, and not against her. Now, as I construe Rule 162 and sub-sec. (f), that sub-section only applies to a case where an injunction can be properly asked against a defendant, who is out of the jurisdiction.

Therefore I think that the order for service upon Mrs. Postlethwaite out of the jurisdiction cannot be justified under sub-sec. (f).

There is more difficulty when the question comes to be considered as to what should be done so far as sub-sec. (g) is concerned. That sub-section provides that service out of Ontario may be allowed wherever "a person out of Ontario is a neces-



sary or proper party to an action properly brought against another person duly served within Ontario." It seems to be well settled in England, and to be recognized in Ontario, that the proper construction to be placed upon this sub-section is that the person within Ontario is to be served before an order can be granted allowing the plaintiff to serve the defendant who is out of the jurisdiction. This is easily practicable under Rules 129 and 130. The plaintiff issues a writ for service within the jurisdiction addressed to both defendants, and serves it upon the defendant within the jurisdiction; he then applies for leave to issue a concurrent writ for service out of the jurisdiction upon the defendant who is out of the jurisdiction, shewing by affidavit the fact of service upon the other defendant within the jurisdiction, and the other necessary facts. The form No. 2, under Rule 128, shews that the writ for service out is directed only to the defendant out of the jurisdiction. In the present case the plaintiff obtained his order for service upon Mrs. Postlethwaite out of the jurisdiction before issuing his writ at all, being perhaps misled by *Re Jones v. Bissonnette* (1902), 3 O.L.R. 54, as to the proper practice. He then served the defendant McWhinney within the jurisdiction on the 8th of July, 1903, and Mrs. Postlethwaite in England on the 11th of August, 1903.

In England it is held that the service upon the defendant in the jurisdiction is, under the terms of sub-sec. (g), a condition which must first be performed to entitle a plaintiff to an order for service upon the defendant out of the jurisdiction, and that a plaintiff who had obtained such an order without first having complied with the condition must begin *de novo*: *Collins v. North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228, 236; *Yorkshire Tannery, Limited, v. Eglington Chemical Co.* (1884), 54 L.J. Ch. 81. The question determined in *Collins v. North British and Mercantile Insurance Co.* does not, so far as I can find, appear to have been raised and adjudicated upon in any of the cases in our own courts.

In *Livingstone v. Sibbald* (1893), 15 P.R. 315, and in *McKay v. Colonial Investment and Loan Co.* (1902), 4 O.L.R. 571, 577, the question considered was whether it was improper to serve the defendant out of jurisdiction before serving the

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defendant within the jurisdiction, the question whether the order for service out of the jurisdiction could be made at all before the plaintiff within the jurisdiction had been served, not having been considered, apparently.

*Re Jones v. Bissonnette*, 3 O.L.R. 54, was an *ex parte* application, the only question considered or raised being whether the plaintiff should obtain the order allowing service out of the jurisdiction before issuing his writ, or should issue the writ first and obtain an order allowing the service after issuing it..

The application in that case having been an *ex parte* one, and the case of *Collins v. North British and Mercantile Insurance Co.* not having been brought to the attention of the Court a practice which would be proper under the other sub-sections of Rule 162, but not under sub-sec. (g), was permitted. The question is, therefore, for the first time squarely raised in the present case, and I think I am at liberty to determine it irrespective of former cases. I am of opinion that the construction placed upon sub-sec. (g) in *Collins v. North British and Mercantile Insurance Co.* is the proper one, and that proof of service upon the defendant within the jurisdiction is an essential prerequisite to the right to obtain an order under that sub-section for service upon the defendant who is out of the jurisdiction, and is not a mere irregularity which should be condoned.

In my opinion, therefore, the appeal should be allowed, and the order allowing the service, and the service of the writ of summons and statement of claim, upon the defendant Mrs. Postlethwaite should be set aside, without prejudice to the plaintiff applying for a further order for leave to issue a concurrent writ for service upon her out of the jurisdiction.

As the practice in this Province has been hitherto unsettled, I think the allowance of the appeal should be without costs.

R. S. C.

[STREET, J.]

## IN RE SYDENHAM SCHOOL SECTIONS.

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Oct. 8.

*Public Schools—Alteration of School Sections—Appeal from Township Council—Powers of Arbitrators—By-Law Altering School Sections—Description of Lots.*

The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of rate-payers, have power only to grant or refuse what is asked for in the petition, and have no power to direct the formation of a section different from that asked for in the petition.

*Re Southwold School Sections* (1902), 3 O.L.R. 81, applied.

In by-laws altering existing school sections or adding territory to them, the lots and parts of lots dealt with must be accurately and exactly described.

THIS was an application by the Board of Trustees of School Section No. 5 of the township of Sydenham to set aside an award of arbitrators appointed by by-law No. 638 of the county council of the county of Grey, under the following circumstances :—

On the 10th of December, 1902, the county council of the county of Grey by their by-law No. 623, reciting the reasons therefor and the consent of the corporation of the town of Owen Sound thereto, detached a large tract of land from the town of Owen Sound and attached it to the township of Sydenham. The whole area of Sydenham theretofore existing had been divided into school sections. On the 5th of May, 1903, a petition signed by a large number of ratepayers was presented to the township council of Sydenham praying them to erect a new school section to be composed of certain of the lots then lately attached to Sydenham by the above mentioned by-law along with certain other lots in that township therein specified which had hitherto belonged to the existing school sections Nos. 1, 5, and 12 therein. The township council on the 5th of May, 1903, refused to grant the prayer of this petition.

On the 18th of May, 1903, the petitioners appealed to the county council reciting the refusal of the township council to grant the prayer of their petition and asking the county council to pass a by-law appointing arbitrators "to consider

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and adjudicate upon the whole question of the altering the existing boundary lines of the aforesaid school sections Nos. 1, 5, and 12, and also of the allotting of the territory detached from the town of Owen Sound aforesaid to the proposed new public school section and the residue of said territory to any of the existing school sections as said arbitrators may in their wisdom adjudge."

On the 19th of June, 1903, the county council passed their by-law No. 638, reciting that a large number of ratepayers interested had appealed to the county council against the refusal of the township council to pass a by-law forming a new school section out of parts of school sections Nos. 1, 5, and 12 along with parts of the territory recently transferred from Owen Sound and attached to Sydenham, and had asked the county council to appoint arbitrators under the Public Schools Act to consider and determine the matters complained of; and that it appeared right and proper to appoint such arbitrators. The by-law then proceeded to appoint arbitrators "to consider and determine all matters in connection with the re-arrangement and alteration of the boundaries of said above referred to school sections, or the erection of a new school section, if deemed advisable to do so; and to do all other acts necessary in such case as may be deemed requisite and in accordance with the provisions of the Public Schools Act of the Province of Ontario, and to make their award in this matter."

The arbitrators on the 15th of August, 1903, made their award "that there be formed in and for the said township a new school section to be named and numbered school section number 16, the same to be composed of," giving a list of lots, including certain lots not mentioned or referred to in the petition to the township council, and omitting certain lots mentioned in that petition. One of the lots mentioned in the award formed part of school section No. 13 and another lot formed part of school section No. 2. The trustees of school section No. 5 thereupon appealed to the High Court against this award and applied to set it aside upon various grounds appearing in the judgment.



The motion was argued before STREET, J., in the Weekly Court on the 7th of October, 1903.

*Rowell*, K.C., for the applicants.

*H. G. Tucker*, for the respondents.

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October 8. STREET, J. (after stating the facts):—The petition asked the township council to form a new school section out of certain specified lots of land; the township council refused to do so. An appeal is given by section 42 of the Public Schools Act of 1901 from such a refusal to arbitrators to be appointed by the county council, and the petitioners applied to the county council to appoint arbitrators which they did. But the county council had no power to authorize the arbitrators to do more than to sit in appeal from the refusal of the township council to grant the prayer of the petition, and either to allow or disallow what the petitioners asked for, and the arbitrators had no power to do more than that. They have not confined themselves to this: they have ordered the formation of a new school section comprising lands which the township council was never asked to deal with, and omitting other lands which the township council was asked to deal with, the result being the formation of a section differing very considerably from that which the petitioners asked the township council to create. The award is, therefore, not the determination of an appeal from the township council, but the promulgating of the views of the arbitrators as to the proper boundaries of a new section, which they had no authority to create.

The case seems clearly within the authority of *Re Southwold School Sections* (1902), 3 O.L.R. 81, and the appeal must be allowed. The award was supported upon the argument by counsel for the petitioners, and the petitioners represented must pay the costs of the appeal.

The power of a township council to deal with portions of the township which have never been attached to any school section seems to be conferred by section 12 of the Act; the power to readjust existing boundaries seems to have been dealt with by section 41. The Sydenham council passed a by-law

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(No. 10) on the 26th of May, 1903, pending the appeal to the county council, distributing their new territory amongst certain existing school sections. Their power to pass this by-law while the appeal was pending was disputed on the argument before me, and there certainly seems to be a good deal of doubt as to its validity, but it has not become necessary for me to pronounce upon the question. I observe, however, that this by-law No. 10 is defective in not fully describing certain "parts" of lots mentioned in it, leaving an uncertainty as to what "parts" of the lots are intended. Such descriptions should shew accurately and exactly what portions of lots are meant to be included.

R. S. C.

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[STREET, J.]

IN RE REID.

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Oct. 30.

*Gift—Donatio Mortis Causâ—Savings Bank Deposit—Delivery of Pass Book—  
Evidence—Corroboration.*

The money at the credit of a savings bank depositor may pass as a *donatio mortis causâ* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book. Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causâ*, that is, any evidence which is believed and is corroborated as required by the statute, may be acted upon.

MOTION for payment out of Court.

Henry Reid, an Irishman by birth, lived for many years in Ontario, and accumulated by day labour a sum of about \$1,500, which lay at his credit in the savings bank department of the Standard Bank of Canada, at Harriston, in Ontario. He was unmarried, and early in 1901 he went to Ireland to see his relations there. Before doing so he had made a will dividing his money equally amongst certain cousins in Ireland. He stayed in Ireland with his cousin George Armstrong, a married man, from May until November. Then he went to stay with his cousin John Armstrong, George's brother, also a married man, who lived a few miles from George. On the 30th of December, 1901, he was taken very ill at John's house and a doctor was called in, who told him he had only a few hours to live and should settle his affairs at once. The doctor then left. In the house at the time with Henry Reid were only John Armstrong and his wife and their young children. John and his wife say that after the doctor left Reid told the wife to bring him his coat, which was hanging up, and that upon her doing so, he took from the pocket of it the savings bank book of the Standard Bank, in which his deposits were shewn, and handed it to her husband, telling him, at the same time, that he was giving him the money mentioned in it. Thereupon, one of the children was sent out for Owen McCabe, the nearest neighbour, a farmer, aged about 50, who came in and who says that the book was again formally delivered to John Armstrong by Reid, in his

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presence and that of Mrs. John Armstrong, with the statement that with that book John could draw the money it represented from any bank in Ireland. The same afternoon John went in to the nearest bank for the purpose, evidently, of trying to obtain the money, but the banker explained that a cheque or order on the bank in Harriston, Ontario, where the money lay, was necessary, and he drew up a form of cheque which John took back to his house. By this time Reid was much worse, and unable to sign his name. The cheque is produced with the name "Henry <sup>his</sup> X Reid," written in the hand of a daughter of John's, and the signatures of Owen McCabe and Mrs. John Armstrong as witnesses, but it is admitted that McCabe was not present when the mark was put to it, and that he did not write his name as a witness until next day. Reid died before seven o'clock upon the same evening. News of his death was sent to George, who came over the same evening with his wife. It is quite plain that John and his wife concealed from George, and from every one else at that time, the fact that John claimed to be the owner of the money of the deceased by virtue of what is alleged to have taken place, and that no hint of it was given to any one for some time afterwards. It does not, indeed, appear when the claim was first made. Probate of Reid's will was granted in Ontario on the 17th of April, 1902, and the executors claimed the money from the bank. It was also claimed by John Armstrong, and the bank paid it into Court in Ontario, under an order made in October, 1902. The executors of Reid then applied for payment out to them, which was opposed by John Armstrong, and evidence was then taken in Ireland on commission by both parties. Upon the return of the commission the matter was argued upon the merits before STREET, J., in Chambers, on the 9th of October, 1903, neither party desiring to take an issue.

*A. Spotton*, for the executors of Reid.

*W. H. Blake*, K.C., for John Armstrong.

October 30. STREET, J.:—(After stating the facts.) The bank pass book, alleged to have been delivered by the deceased to John Armstrong, contains a printed condition that no part of



the deposit can be withdrawn by the depositor without production of the pass book, and under the authorities the existence of this condition makes the delivery of the book with the intention of passing the money mentioned in it a valid *donatio mortis causá* of the money: *Brown v. Toronto General Trusts Corporation* (1900), 32 O.R. 319; *In re Weston*, [1902] 1 Ch. 680. The only question, therefore, is whether the evidence is such as should satisfy a Court that a *donatio mortis causá* of this money to John Armstrong was intended by the deceased, and that this intention was properly carried into effect.

I have come to the conclusion, though not without some hesitation, that the claim of John Armstrong has been made out. The authorities have laid it down that evidence sufficient to prove any fact against the estate of a deceased person is sufficient to prove a *donatio mortis causá*: in other words, any evidence which is believed, and which is corroborated so as to comply with the 10th section of the Evidence Act, may be acted on by the Court. I confess that it appears to me that it would have been better to require as high a degree of evidence to prove a *donatio mortis causá* as to prove a will. To take the present case as an example. If the deceased had formally written down with his own hand a codicil to his will, giving to John Armstrong the money in question, and the codicil had been duly executed by him, and been witnessed by his wife and Owen McCabe, the witnesses who prove the present transaction, the gift would have failed to take effect because of the disqualification of the wife as a sufficient witness to a bequest to her husband. But under the authorities the evidence of these same two persons is sufficient to establish a transaction having practically the same effect, and which is effected without any writing and by the simple act of handing over the pass book with words of gift: *Re Farman* (1887), 58 L.T. N.S. 12; *Cosnahan v. Grice* (1862), 15 Moo. P.C. 215; *Brown v. Toronto General Trusts Corporation*, 32 O.R. 319.

I can find in the present case, however, no sufficient reason on the face of the depositions for rejecting the evidence, either of Owen McCabe or of Mrs. John Armstrong, and I feel bound, therefore, to hold that a valid *donatio mortis causá* has been

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made out in favour of John Armstrong of the fund in Court. I think the costs of all parties should be paid out of the fund ; those of the executors as between solicitor and client, and that the balance should be paid out to John Armstrong.

R. S. C

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## [DIVISIONAL COURT.]

## RUSHTON V. GRAND TRUNK R. W. CO.

D. C.

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July 16.

*Practice—Motion for New Trial—Examination on Pending Motion—Admissibility of Evidence—Witnesses at Trial—Con. Rule 491.*

Evidence of persons who had been witnesses at a trial, that the evidence they then gave was not true, and that certain statements made by them before trial to the plaintiff's solicitor were true, is not receivable on a motion for a new trial.

*Per STREET, J.*, Rule 491, as to examining witnesses on pending motions, applies to motions for a new trial before a Divisional Court.

*Per STREET, J.*, also The Master in Chambers has no power to refer a matter before him to the Divisional Court.

THIS was an action to recover damages against the defendants which was tried before Britton, J., at Simcoe, with the result that a non-suit was ordered. The plaintiff gave notice of a motion to the Divisional Court for a new trial, and to set aside the non-suit on the ground that there was evidence which should have been submitted to the jury, or, in the alternative, for a new trial on the ground of surprise. In support of the latter branch of the motion it was alleged that certain witnesses called for the plaintiff had withheld evidence which they could have given in support of the plaintiff's case at the trial, and that they were willing to give such evidence in case a new trial should be granted. The plaintiff's solicitor made an affidavit to this effect, and, having given notice of motion to the Divisional Court for a new trial, obtained from the local registrar at St. Thomas an appointment and subpœna for the examination of three men who had given evidence at the trial, with the intention of using their depositions upon the motion. The defendants applied in Chambers to set aside the appointment and subpœna on the ground that the plaintiff was not entitled to examine witnesses *vivâ voce* upon a motion for a new trial; and that, in any event, the evidence sought to be obtained could not properly be received by the Court. The Master in Chambers, being in doubt upon the matter, referred it to the Divisional Court, and the matter was argued on June 1st, 1903, before FALCONBRIDGE, C.J.K.B., and STREET, J.

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*W. R. Riddell*, K.C., for the defendants.

*Shirley Denison*, for the plaintiff.

The following were referred to :—*Phillips v. Hatfield* (1840) 8 Dowl. Pr. C. 882; *Berry v. Da Costa* (1866) L.R. 1 C.P. 331; *Harrison v. Harrison* (1821) 9 Pr. 89; and two unreported decisions in the Queen's Bench Division, *Kendry v. Stratton* June 10th, 1893, and *Cardwell v. Cardwell*, February 8th, 1894,

July 16. FALCONBRIDGE, C.J.:—On well-recognized principles of public and judicial policy, the Court ought not to receive or act upon evidence of persons who were examined as witnesses at the trial for the purpose of shewing that they, when giving evidence, deliberately misstated or concealed the true facts, *i.e.*, committed perjury: *Harrison v. Harrison*, 9 Price 89; *Phillips v. Hatfield* 10 L.J.N.S. Ex. p. 33, also reported in 8 Dowling Pr. C. 882; *Berry v. Da Costa*, L.R. 1 C.P. 331; and this Division in *Kendry v. Stratton* (1893), and *Cardwell v. Cardwell* (1894), unreported.

The appointment to take the evidence will be set aside, with costs, here and below.

STREET, J. [after stating the facts as above]:—There is no power given by the rules to the Master in Chambers to refer questions before him to a Divisional Court for determination. The motion before us was made in the form of a substantive motion to set aside the appointment to examine the witnesses; this was a motion properly determinable in Chambers, but which, by agreement of the parties, the Divisional Court might properly hear; and, as no objection was taken, the argument proceeded before us.

I am unable to discover any ground upon which we can hold that Rule 491 does not apply to motions for a new trial before a Divisional Court; and I am, therefore, of opinion that, in a proper case, the depositions of witnesses whose evidence is required for the purpose of applications pending before the Divisional Court may be taken under this Rule, where such evidence is properly receivable, and cannot be obtained upon affidavit.



In the present case, however, the avowed and only object of the examinations is to obtain from certain persons who were examined as witnesses for the plaintiff at the trial statements that the evidence they gave at the trial was not in fact true, and that certain statements made by them before the trial to the plaintiff's solicitor were true. In my opinion, it would be dangerous in the extreme to permit evidence of this nature to be received upon a motion for a new trial, and we should not receive either affidavit or depositions from witnesses for the purpose of establishing that they had wilfully concealed or misrepresented the truth when giving their evidence upon oath at a former trial.

*Phillips v. Hatfield*, 8 Dowl. Pr. C. 882; *Harrison v. Harrison*, 9 Pr. 89.

Being of opinion that we should not receive the evidence of the witnesses if it were taken, I think we should set aside the appointment to take it; and the plaintiff should pay the costs of the motion in Chambers, and here.

A. H. F. L.

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[IN CHAMBERS.]

1903

GRAHAM V. BOURQUE.

Nov. 2.

*Chose in Action—Assignment of Money Payable in respect of Contract—Damages for Interference with the Work—Attachment of Debts.*

A contractor for the construction of a drain assigned to a bank as security for advances "all and every sum or sums of money now due to or to become due and payable to me by (the employer) in respect of a certain contract existing between myself and the said (employer) for the construction of section three of the drain," describing it. The cost of doing the work was increased owing to the employer negligently allowing water to flow into the drain, and the contractor obtained a judgment against the employer for damages for the negligence:—

*Held*, that the amount payable under this judgment passed to the bank as money payable in respect of the contract and was not attachable by a judgment creditor of the contractor.

APPEAL by the claimants in garnishee proceedings from an order directing payment to the judgment creditor.

Joseph Bourque, one of the judgment debtors, made a contract with the corporation of the city of Ottawa for the construction of a drain in Ottawa: he then entered into arrangements with the Bank of Ottawa to borrow the money for carrying on the work. As part of the security for the advances to be made to him by the bank he assigned to the bank "all and every sum or sums of money now due or to become due and payable to me by the corporation of the city of Ottawa in respect of a certain contract existing between myself and the said the corporation of the city of Ottawa for the construction of section three of the main drain in the city of Ottawa," and by the same instrument he appointed them his attorneys to receive the same and to give releases therefor.

While Bourque was proceeding with his work under the contract he found himself hindered and put to additional expense by the fact that the corporation of the city continued to send water down certain existing street drains of theirs, which water found its way into the works of Bourque under his contract owing to defects in the drains through which the water was sent down. The money required from and advanced by the Bank of Ottawa to Bourque for the purpose of completing his contract work was largely increased because of the expense of getting rid of this water and the damage and

inconvenience caused by it. Bourque brought an action against the city corporation to recover the additional cost occasioned by this water as damages and obtained a judgment against them for \$2,810.50. See *Bourque v. City of Ottawa*, ante 287. The judgment creditor took garnishee proceedings against the judgment debtors to seize this judgment debt, and the Bank of Ottawa claimed the money under the assignment, their advances being still largely unpaid.

The learned Judge of the county court of Carleton, before whom the garnishee proceedings were had, after hearing the evidence, held that the debt in question did not pass to the bank under the assignment and ordered payment to be made by the city to the judgment creditor.

The bank's appeal was argued before STREET, J., in Chambers, on the 10th of October, 1903.

*W. E. Middleton*, for the appellants.

*J. H. Moss*, for the judgment creditor.

*W. N. Ferguson*, for the garnishees.

November 2. STREET, J.:—In my opinion the Bank of Ottawa is entitled under the assignment from Bourque to receive from the city the moneys in dispute here. The language of the assignment extends to all monies which may become payable "in respect of the contract." The contract between Bourque and the city gave rise to a duty or to an implied contract, no matter which, binding the city to do nothing to impede Bourque in the execution of the work and to a liability to compensate him if they should do anything to impede him. If this had been set forth in the contract it is clear that the compensation would have passed to the bank under the assignment; but the same duty on the part of the bank to pay, and the same right to the contractor to receive compensation, although not set forth in express language in the contract, arise out of the mere fact that such a contract has been made; and, therefore, the compensation should be held to be money payable "in respect of the contract."

The appeal should, therefore, be allowed with costs to the bank and the garnishees here and below.

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## [DIVISIONAL COURT.]

## IN RE WARBRICK AND RUTHERFORD.

D. C.

1903

Nov. 9.

*Landlord and Tenant—Overholding Tenant—Writ of Possession—Prohibition to County Judge and Sheriff—Certiorari—R.S.O. 1897, ch. 171, sec. 6.*

After an order had been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ had been issued, the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff:—

*Held, per STREET, J.*, that proceedings under the Overholding Tenants Act can be removed into the High Court only when section 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief.

*Per BRITTON, J.*, that whether section 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court. Judgment of MACMAHON, J., affirmed.

THIS was an appeal by the tenant Rutherford in a proceeding under the Overholding Tenants Act, R.S.O. 1897, ch. 171, from an order of MacMahon, J., refusing his application for an order under section 6 of that Act, commanding the Judge of the county court, before whom the proceedings were had, to send up the proceedings before him into the High Court, and for a prohibition prohibiting the Judge and the sheriff from taking any further proceedings under an order made by the said Judge for a writ of possession to issue to place the landlord in possession.

Although an order had been made by the Judge of the county court, no writ of possession had been issued pursuant to the order, and MacMahon, J., dismissed the motion, holding that there was no authority for making it until after a writ of possession had been issued.

The tenant's appeal to the Divisional Court was argued on the 2nd of November, 1903, before STREET, and BRITTON, JJ.

*Robert McKay*, for the tenant.

*W. T. J. Lee*, for the landlord.

November 9. STREET, J.:—The appellant contends that the ordinary right to certiorari and prohibition in respect of proceedings under the Overholding Tenants Act is not interfered with by the special provisions contained in section 6 of the Act.



That section is as follows:—"Where such writ"—that is, a writ commanding the sheriff to place the landlord in possession—"has been issued, the High Court or a Judge thereof may on motion within three months after the issue of the writ command the Judge to send up the proceedings and evidence in the case to the Court, certified under his hand, and the Court may examine into the proceedings, and, if the Court finds cause, may set aside the same, and may, if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land."

In my opinion, this section was intended as the means, and the only means, by which the tenant may have the proceedings taken by his landlord removed into the High Court and examined there. To hold otherwise would, it seems to me, go a long way towards impairing the usefulness of the Act, which is intended plainly to afford a speedy and simple method to landlords of obtaining possession against tenants who are overholding wrongfully. Under the Act, as soon as the landlord has obtained his writ of possession, the tenant may make his application to the High Court for the removal of the proceedings. If we were to hold that he could do so before the writ were issued, we should open a door for delays which it was the object of the Act to prevent.

I think the appeal should be dismissed with costs.

BRITTON, J.:—Without going so far as to say that section 6 of R. S. O. 1897, ch. 171, was intended as the only means by which the tenant may have the proceedings taken by his landlord removed to the High Court, I quite agree that that section amply protects the tenant. Assuming that the papers before us disclose absence of jurisdiction in the county Judge under that Act, the tenant can not be interfered with until the writ of possession issues. It may never issue; but if it does, the tenant can apply under section 6.

At this stage and upon the facts before us, the applicant is not entitled *ex debito justitiæ* to certiorari, and so I agree that the motion should be dismissed.

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—  
IN RE  
WARBRICK  
AND  
RUTHERFORD  
—  
Street, J.

## [IN THE COURT OF APPEAL.]

C. A.

1902

Sept. 18.

1903

Sept. 14.

## THE MIDLAND NAVIGATION COMPANY.

v.

## THE DOMINION ELEVATOR COMPANY.

*Ship—Charter—Place of Loading—Regulations of Port—Duty of Charterer—  
Duty of Ship-owner—Breach—Damages.*

The plaintiffs being the owners of a steam vessel, called the *Midland Queen*, agreed by telegram with the defendants to carry a cargo of wheat from F. W. to G. at four and a half cents a bushel as follows:—"We confirm *Midland Queen* four and a half, load F. W. on or before noon fifth December." The wheat was in the elevators of a railway company at F. W. and the vessel arrived in that harbour on 3rd December. Several other vessels had arrived before her, and she had to take her turn to get to the elevators, that being a regulation of the railway company, of which all parties were aware. Not having been loaded by the time fixed, to save her insurance she had to leave without a cargo:—

*Held*, that the defendants' duty was to furnish a cargo at the elevators, which was the only place of loading, and that the contract should be read as if the words "at the usual place" were inserted; that the plaintiffs' contract was to proceed to the usual place of loading, receive the cargo and carry it to the point of destination; that the loading was to be done by noon of the 5th; that the defendants not having done anything to obstruct the vessel in getting to the elevators and the plaintiffs having failed to shew that the defendants were in default, their action should be dismissed.

*Held*, also that the vessel not having arrived sufficiently in advance to secure her turn in time, the defendants were entitled to such damages as fairly resulted from the breach of the contract and were in contemplation of the parties.

Judgment of MacMahon, J., at the trial, reversed, MacLennan, J. A., dissenting.

THIS was an appeal by the defendants from the judgment at the trial.

The action was tried at Toronto on the 21st and 22nd of April and the 10th of June, 1902, before MacMahon, J., without a jury.

*Robinson*, K.C., and *F. E. Hodgins*, K.C., for the plaintiffs.  
*Aylesworth*, K.C., and *C. A. Moss*, for the defendants.

September 18. MACMAHON, J.:—The plaintiffs are the owners of the steamship, *Midland Queen*: and the action is to recover the sum of \$4,590 for alleged breach by the defendants, (a company formed for the purpose of buying, storing and selling grain), of an agreement to furnish to the said steamer a cargo of grain, to be carried from Fort William to Goderich.

The defendants' besides denying liability, set up a counter-claim for \$7,500 damages for alleged breach of the said agreement to carry the said cargo of grain between the places named.

The correspondence, which ended in a contract being concluded for the carrying of a cargo of grain by the *Midland Queen*, was carried on by A. F. Read, of Montreal, representing the owners of the *Midland Queen* and G. R. Crowe, of Winnipeg, representing the defendant company.

By telegraph from Crowe to Read, dated November 22nd, 1901, he offers, on behalf of the defendants, to load *Midland Queen* last trip at Fort William at four and a half cents, to discharge at Georgian Bay or Goderich, our option. This is confirmed by letter of same date.

On the 23rd November, Read telegraphed Crowe as follows: "Playfair" (plaintiffs' manager), "confirms charter *Queen*, Fort William to Goderich, loading about December 2nd, weather, ice, permitting, four and a half cents bushel. Confirm." On the same day Crowe replied to Read: "We confirm *Midland Queen* four and a half, Goderich, load Fort William on or before noon 5th December."

Playfair wrote Crowe on 23rd November saying: "If all goes well the *Queen* should be at Fort William to load about the first of the month. I think this will be our last trip, unless the insurance company extends the time to the 12th, as I see they are thinking of doing."

On the 27th November, Read telegraphed Crowe: "Playfair writes in answer to yours of the 22nd, that he won't go to Goderich unless steamer is discharged at Moore's elevator. Claims McGaw cannot unload her promptly at his mill." Read not receiving an immediate reply to this, telegraphed Crowe on the 28th: "Can you say to what elevator it is intended to despatch *Queen*? No reply my message yesterday."

Mr. Crowe's evidence was taken in Winnipeg under commission, and during his examination he produced a copy of a telegram from himself to Read, dated the 28th of November: "*Midland Queen* is chartered for Goderich. Shipper has right to discharge at Moore's or mill elevator, whichever suits his purpose."

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Crowe telegraphed Read on the 29th November, that shipper intended sending her (the *Midland Queen*) to mill elevator—McGaw's mill. After the receipt of this, and on the 30th of November, the *Queen* left for Fort William, and Playfair telegraphed Crowe to try and arrange to unload her at Moore's.

On the 30th November, Read telegraphed Crowe: "*Queen* leaves Midland this afternoon. Kindly advise Dominion Elevator Company to have no delay at Fort William." And on the 3rd December, Read telegraphed Crowe: "*Queen* due Fort William to-day. Is her grain ready, and will she be loaded promptly? Playfair anxious, as he wants to winter her in Collingwood, not Goderich."

On the 3rd December, Playfair telegraphed Crowe: "*Queen* Fort William. Capt. wires can't get loaded before Saturday or Sunday Boat must be loaded before noon of 5th or will come home. Can't get insurance Co. to extend time. Can't you load, as understand grain ready in elevator? Answer."

R. E. Reese, the agent at Fort William of the owners of the elevators, telegraphed to Phillips, general manager for the defendants at Winnipeg, on the 3rd December, at 5.14 p.m., saying: "*Midland Queen* here. Big fleet ahead of her. Can you arrange load her Port Arthur."

The Dominion Elevator Company telegraphed Reese in reply on same day, at 7.15 p.m.: "If captain will reduce freight to three and half, will see what can be done." Captain Featherstonhaugh telegraphed the Dominion Elevator Company in reply, same day: "Yes, will accept your offer, load *Midland Queen* Wednesday or Thursday. Answer." And on the 4th the elevator company wired Featherstonhaugh: "Telegram received, am working on it, will wire you later if can work."

On the 4th December at 1.35 p.m. the Dominion Elevator Company telegraphed Captain Featherstonhaugh, at Fort William: "Special instructions sent Sellars (the superintendent of the elevator company), give you your load to-morrow Fort William, and are wiring him too."

The special instructions sent Sellars by the elevator company was in a telegram, dated 4th December, as follows: "*Midland Queen* great value to us to load not later than to-morrow.



Lanigan\* promises every assistance and says wiring you. Do all you can. She has four compartments. Would like one compartment one hard, one compartment each 1, 2 and 3 Northern, but if inconvenient load her with anything convenient, all one grade or any grades at all that suit you."

On the same day (4th December), at 4 o'clock, the Dominion Elevator Company telegraphed Reese: "See captain *Midland Queen* and have it definitely settled rate is three and half if loaded to-morrow, and wire immediately. Very important. Cannot say more."

On the 4th December, at 4.58 p.m., Playfair wired Captain Featherstonhaugh: "Cannot get insurance extended. Leave before eleven to-morrow morning sure. If light, come to Collingwood. Answer when leave." To this Featherstonhaugh replied at 8.15 p.m. same day: "Shippers hold *Queen* for damages, if leave before Thursday night. I gave them that time supposing insurance extended, expect be loaded Thursday night. Rush answer."

On the same day Captain Featherstonhaugh wired the elevator company; "Owners ordered *Midland Queen* home, cannot get loaded before noon Thursday."

The elevator company answered Captain Featherstonhaugh same day: "Will hold ship for damages, if you leave without our sanction."

On the 4th December, the Dominion Elevator Company telegraphed to Captain Featherstonhaugh: "Have received wire from Fort William, saying Mr. Sellars will commence loading your steamer to-morrow morning. You must be ready to take the cargo."

On the 5th December, at 10.07 a.m., Reese telegraphed the elevator company: "*Midland Queen* ordered leave before eleven o'clock by owner. Cannot get insurance extended."

On the 5th December, Crowe telegraphed Read: "Shipper advises me he tendered *Queen* her cargo last night."

The *Midland Queen*, not having been loaded, left for Collingwood just before eleven o'clock, (that being twelve o'clock, Chicago time), at which hour the insurance would expire if the return voyage had not then commenced.

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\* The man who superintended the loading of the vessels.—REP.

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Read, the plaintiff's agent, having advised the defendants on the 23rd November, when confirming the charter of the vessel, that she would be at Fort William, ready to load about the 2nd December, the defendants were, by their telegram of the same day, (November 23rd), stipulating for an extended time to load, viz.: "On or before noon 5th December."

Both parties were contracting for a time limit for loading the vessel, and having in view the question of insurance of the respective properties—the plaintiffs of their vessel, and the defendants of their grain. Playfair, in his letter of 23rd November to Crowe, said: "I think this will be our last trip, unless the insurance company extends the time to the 12th, as I see they are thinking of doing." And Mr. Phillips, in his evidence at the trial, said he saw the telegram of the 23rd November before it was sent by Crowe to Read, in which it is stipulated that the *Queen* is to load before noon on the 5th of December, but says he told Crowe, that it must be understood that he was not obliged to load before noon. The language of the telegram is so explicit, that the vessel is "to load on or before noon on the fifth," that if Phillips was not intending to be bound to load by that time, it is surprising he did not instruct Crowe, who was acting on his behalf, to alter the telegram so as to express his intention. Crowe in his evidence, says that as a result of his conversation with Phillips, and his own knowledge of the terms of policies, issued by insurance companies, he stipulated the terms mentioned in the telegram.

The plaintiffs intended the steamer to reach Fort William about the 2nd December, thus giving ample time for loading before noon on the 5th December, when the insurance on the vessel would expire if she had not at that hour commenced her voyage.

The steamer reached Fort William at three o'clock on Tuesday, the 3rd December, and Captain Featherstonhaugh immediately reported his arrival to Mr. Sellars, the superintendent of the elevators, and told him the vessel was at the dock ready to load. Sellars replied that he did not think the vessel could load before Saturday, and told the captain to see Mr. Reese, the agent of the elevator company, who looked after the loading of the grain from the elevators into the vessels.

Reese was seen by the captain, who asked him if they were going to load the *Queen* and Reese said "Yes," but mentioned the number of vessels at the dock ready to load, which were ahead of the *Midland Queen*, and thought she could not be loaded before Saturday; and it was in consequence of this condition of affairs at the dock, that Reese suggested having the vessel loaded at Port Arthur; and in the captain's presence wrote the telegram of December 3rd to the elevator company, suggesting that the vessel be loaded at that port, to which the elevator company replied, stipulating for a reduction of the freight to three and one-half cents, if place of loading changed; to which, as already stated, Captain Featherstonhaugh replied assenting to the change, providing steamer loaded Wednesday or Thursday, but nothing came of it, as a message of the 4th December from the Dominion Elevator Company to Captain Featherstonhaugh informed him that instructions had been sent Sellars to give the vessel "its load to-morrow at Fort William."

Vessels are loaded with grain from spouts, and the *Midland Queen*, although at the elevator docks, was 400 or 500 feet from where she could get under an elevator spout to be loaded. Once under the elevator spouts she could be loaded in from six to eight hours, and Reese thought they could load her at Port Arthur either that day (the third) or the next.

Mr. Sellars was in error as to his not seeing Captain Featherstonhaugh until Thursday morning, as Captain Featherstonhaugh saw Reese on Wednesday afternoon, and it was at Sellars' suggestion that Reese was seen by the captain.

A telegram of the 5th December from Crowe to Read states that shippers advised him (Crowe) that cargo had been tendered *Queen* the previous (Wednesday) night.

Captain Featherstonhaugh said the statement was not true, and that the cargo was not offered that night, and that Sellars told him the *Queen* could not commence loading until ten o'clock Thursday morning. The evidence of the captain is confirmed by the telegram from Sellars to Phillips of the 4th, at 5.58 p.m., stating that "the *Queen* can commence loading Thursday morning, if that will do."

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Sellars said that they commenced loading vessels from the elevators at seven a.m., and continued loading until eleven p.m. Had the loading, therefore, commenced on Wednesday night at seven o'clock, it could have been finished before eleven o'clock on Thursday morning. Or had the wheat in the elevator at Port Arthur (about 25,000 bushels) been put in the vessel, even the whole or the greater part of the cargo could have been put on board by noon on the 5th December.

The plaintiffs did all that could be done to carry out the terms of the charter. The vessel arrived at the dock at Fort William in the afternoon of the 3rd December; her arrival was immediately reported to Mr. Sellars, the superintendent of the elevators, and to Mr. Reese, the agent of the elevator company.

Then, what is the meaning of the words "load on or before noon fifth December?" In *Bowes v. Shand* (1877), 2 App. Cas. 455, where there were two contracts each for the sale of 300 tons of rice *to be shipped* at Madras during the months of March and April, 1874, per *Rajah of Cochin*, the 600 tons filled 8,200 bags, and of this quantity all but 1,080 bags had been put on board on the 24th and 28th days of February, the 1,080 bags being put on board on the 3rd March. It was held that the rice had not been shipped during the months of March <sup>and</sup> <sub>or</sub> April.

Lord Justice Blackburn considered what is the meaning which should, in the absence of any evidence of mercantile usage, be put upon the word "shipped" in a contract of that sort, and said at page 482: "I think the material thing is the completion of the putting it on board, which would entitle you to the bill of lading."

Speaking of the contract in that case, Lord O'Hagan, at pp. 478-9, said: "We have to consider a written contract, . . . the terms of which are clear and intelligible, and convey very distinctly the purpose of the parties to it. Regarded in themselves, those terms are the proper subject of construction by a Court, and not by a jury; and they appear to me fully to sustain the contention of the defendants. Commercial usage, or the well-established understanding amongst mercantile men, may sometimes be applied to put on words, apparently distinct,



a sense other than that which reasonably and naturally belongs to them."

According to my reading of the contract in this case, the words in their natural sense have a definite meaning which is, that the vessel was to be completely loaded by noon on the 5th December. "Shipped" and "to load" are synonymous terms and each mean the completion of putting the cargo on board: (see judgment of Lord Selborne in *Grant & Co. v. Coverdale, Ford & Co.* (1884), 9 App. Cas. 475. There was, however, evidence given on behalf of the plaintiffs, as to what is the meaning amongst shippers of "to load;" that it means that the whole cargo is to be in the vessel at the time stated in the contract. Evidence was given on behalf of the defendants, that the contract would be complied with if the charterer had commenced loading at the time named. The defendants when telegraphing construed the contract as meaning that the whole cargo should be on the vessel at the time stated.

There is no provision in the contract for "lay-days" and "demurrage days"; and where a fixed time is provided in the contract for loading or unloading a vessel, the duty of the charterer is clearly stated by the House of Lords, in *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599, the head note to which is:

"The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charter-party, and by the circumstances of the case. If, by the terms of the charter-party, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time."

And Lord Blackburn in his judgment, at p. 618, cites from Abbott on Shipping 5th ed. p. 180, as still being the law, the following: "And where the time is thus expressly ascertained

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and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, *for he has engaged that it shall be done.*" These last words, Lord Blackburn says, were put in italics by Lord Tenterden.

In *Randall v. Lynch* (1809), 2 Camp. 352, it was held that the charterer should bear the risk of delay arising from the crowded state of the place at which the ship was to load or discharge.

And in *Budgett & Co. v. Binnington & Co.*, [1891] 1 Q.B. 35, where there was an absolute contract on the part of the consignees to have the cargo unloaded within a specified time, in such a case the merchant takes the risk. And in *Davies v. McVeagh* (1879), 4 Ex. D. 265, Bramwell, L.J., said: "When a ship is to take on board a cargo at a specified place of loading, the responsibility rests not with her owner but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time. . . . Definitions are always dangerous, and I am not anxious to state one, which hereafter may be questioned; but I think it may be laid down that a vessel has reached the place of loading, as distinguished from the spot of loading, when she has entered that port from which her voyage is to commence," p. 268.

In *Tapscott v. Balfour* (1872), L.R. 8 C.P. 46, by the charter-party the plaintiffs' ship was to load at any Liverpool dock, as directed by the defendants, and there load a cargo of coals. The defendants directed that the ship should proceed to the Wellington dock at Liverpool. Cargoes of coal are most usually loaded in the Wellington dock from "tips," of which there are only two in the dock, and by the dock regulations no coal agent is permitted to have more than three vessels in the dock at a time. The plaintiffs' ship was ready to go into the dock on the 3rd of July, but was not allowed to enter because the coal agents employed by the defendants to supply the cargo had three vessels already in the dock, and two others in turn to go in. She was allowed to go into the dock on the 11th July, but could not get under the "tips" for some time, owing to the number of vessels in turn to go under them before her.

In an action for demurrage, Bovill, C.J., in his judgment said: "There is no express stipulation in the charter as to the time when the loading was to begin, and we must therefore consider what is the ordinary rule on the subject. The rule is, that when a port is named in the charter-party as the port to which the vessel is to proceed, the lay-days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. If, when she arrives there, the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port," p. 52.

Mr. Justice Mathew in his judgment in *Pyman Brothers v. Dreyfus Brothers & Co.* (1889), 24 Q.B.D. 152, said: "It may be stated to be the rule that where the port of loading or discharge named in the contract contains several places of loading or discharge, and the contract also names a time in which the vessel is to be loaded or discharged, the option of the merchant in the selection of the place of loading or discharge is to be exercised subject to the obligation into which he has entered that the cargo shall be loaded or discharged within the time named. Here the vessel arrived on December 22, at a point where she was at the disposition of the charterers. They had only to indicate the place to which she was to go for her cargo, and she would have been there immediately. The place of loading chosen by the charterers was a place where she could not load, as it was a part of the port then crowded by other ships, and she had to wait a considerable time. It appears to me that during all this time the charterers were contracting a liability under their contract that the ship should be loaded during the time specified in the charter-party:" p. 157.

This is accepted as being a correct exposition of the law by the authors of the 14th edition of Abbott's Merchant Shipping, p. 394. And at page 396 a distinction is drawn between that case and the cases of *Brown v. Johnson* (1842), 10 M. & W. 331, and *Kell v. Anderson* (1842), 10 M. & W. 498.

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In Scrutton on Charter-parties 4th ed., p. 96, it is said the decision in *Pyman v. Dreyfus* is erroneous and appears contrary to *Dahl v. Nelson* (1881), 6 App. Cas. 38, which decided that a ship chartered to Odessa, or as near as she can safely get, must wait a reasonable time to overcome any temporary obstacle.

In *Dahl v. Nelson* it was held that a charter-party for a ship to sail to "London, Surrey Commercial Docks," is not satisfied by the ship arriving at the gate of the docks but not entering into the docks. As the vessel had not entered the docks, she had not reached her place of destination. The dock authorities, on the arrival of the vessel at the gates, refused to let the vessel inside the dock gates, and this was held to be the fault of neither party. But Lord Blackburn said in that case, at page 44: "If the charter-party had left it free to the merchant to select a dock, it may be well that he was bound to select one into which admittance could be procured. *Ogden v. Graham*, 1 B. & S. 773, is an authority in favour of that position."

The contract in the present case has no reference to "lay days" or "demurrage" or "to load with customary despatch" or "in customary manner" or "loaded in her turn." The plaintiffs say the steamer will reach Fort William about the 2nd December to be ready to load; the defendants reply contracting that she will be loaded on a particular day and by a named hour. By the terms of the contract it is a condition that the vessel shall be loaded by the time named. As said by Lindley, L.J., in *Budgett & Co. v. Binnington & Co.* [1891] 1 Q.B. at p. 40: "This stipulation is in terms unconditional, and it has frequently been called an absolute contract, by which I understand an unconditional contract." The vessel was at the dock ready to load, although she was unable to get under the grain spout from which she could be loaded.

In addition to the evidence given by those engaged in the insurance business, shewing, that in all the companies the insurance on the hulls of vessels expired on the 5th of December, at noon, Chicago time, two policies were put in, one issued by the British America Assurance Company, and the other by the Mannheim Insurance Company (doing business in the



United States), insuring the *Midland Queen*, shewing that the policies contained the clause limiting the insurance to the date and hour named. But each policy provides that in the event of a vessel being on a voyage on the 5th December, at twelve noon, (Chicago time), the policy is to continue at the *pro rata* rate until the arrival at the port of destination, provided notice is given to the assurers before noon of the 5th December. And it is clear from the evidence of Mr. Crowe that he had this provision as to the expiration of the insurance in his mind when he sent the telegram of the 23rd November to Read.

There was no new contract entered into by the captain of the *Queen*, as to the carrying of the cargo from Port Arthur. Had he signed bills of lading for a less freight than that stipulated for in the charter-party, he would have been bound to deliver the goods on being paid the rate of freight mentioned in the bills of lading: Lawes on Charter-parties, p. 117. Although the captain agreed to accept 3½ cents freight from Port Arthur, the defendants, when they received his message, replied that they would see what could be done. There was, therefore, no concluded agreement.

Even assuming, that the captain had authority to grant an extension of time for loading the vessel until the evening of the 5th December, his doing so was on the understanding that the insurance on the vessel had been or would be extended.

The defendants are liable to the plaintiffs for not loading this cargo by the time named, and the measure of damage is the amount of the freight which would have been earned. See *Smith v. McGuire* (1858), 3 H. & N. 554. The vessel could have taken on board 102,000 bushels, which at 4½ cents per bushel would amount to \$4,590.

There will be judgment for the plaintiffs for this sum, together with interest from the 15th December, 1901, and the costs of suit.

The defendants' counter-claim is dismissed with costs.

From this judgment the defendants appealed to the Court of Appeal and the appeal was argued on the 15th, 16th and 17th of April, 1903, before MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, JJ.A.

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*Aylesworth*, K.C., and *C. A. Moss*, for the appeal. The plaintiffs knew of the custom of the port, that the vessel would have to take its turn to get to the elevator; which was the place it had to get to in order to be loaded under the contract. The vessel did not start in time and did not arrive in port in time, in fact, did not finish its journey at all, as it stopped short of the elevator, the point of destination, when it turned and went away. The defendants had nothing to do with the vessel's insurance, the cause of her going away, and they were damaged, as they had the wheat ready to be loaded and the plaintiffs broke the contract. The word "load" in the contract should be construed by the Court as meaning, that the loading was to be begun by noon of the 5th December. The trial Judge erred in holding that the defendants were bound to load the vessel, no matter where she was in the harbour. The following cases were cited and references made: *McKay v. Dick* (1881), 6 App. Cas. 251, at p. 263, *per* Lord Blackburn; *Ford v. Cotesworth* (1870), L.R. 5 Q.B. 544; *Glynn v. Margetson & Co.*, [1893] A.C. 351; Scrutton on Charter-parties, 4th ed., 94, 244; Abbott's Merchant Shipping, 14th ed., 373, 392, 393, 429; *Hick v. Raymond & Reid*, [1893] A.C. 22; *Postlethwaite v. Freeland*, 5 App. Cas. 599; *Morris v. Levison* (1876), 1 C.P.D. 154; Am. and Eng. Ency. of Law, 2nd ed., under "Demurrage," vol. 9, pp. 231, 232, 239, 242; *Nelson v. Dahl* (1879), 12 Ch. D. 568, at p. 583; *Pyman Brothers v. Dreyfus Brothers & Co.*, 24 Q.B.D., at p. 156; *Thiis v. Byers* (1876), 1 Q.B.D. 244, at p. 249; The Manitoba Grain Act, 63 Vict. ch. 39 (D.).

*Robinson*, K.C., and *F. E. Hodgins*, K.C., contra. There was no custom of the port of Fort William, even if it was known how business was carried on there. If there was, it has to be proved and shewn to be known to the grain trade: *Hayton v. Irwin* (1879), 5 C.P.D. 130; *Lawson v. Burness* (1862), 1 H. & C. 396; *Hudson v. Clementson* (1856), 18 C.B. 213; *Kirk v. Gibbs* (1857), 1 H. & N. 810; *Bradley v. Denton* (1854), 3 Wis. 557, at p. 572; *Bailey v. Damon* (1854), 3 Grey (Mass.) 92; Milloy's *de jure Maritimo et Navili*, pp. 255 and 256; Scrutton on Charter-parties, 4th ed., 104; Sutherland on Damages, 2nd ed., vol. 3, pp. 2012-2017. The vessel was an arrived vessel as soon

as she arrived in port, and getting her to the place of loading was the duty of the charterer: *Nelson v. Dahl*, 12 Ch. D., at pp. 581, 582; *Tharsis Sulphur and Copper Co. v. Morell Brothers & Co.*, [1891] 2 Q.B. 647, at p. 649. The vessel should not be ordered to a blocked place: *Dahl v. Nelson*, 6 App. Cas. 38, at pp. 56, 57. The loading was not delayed by non-arrival in time, but by blockade: *Harris v. Best* (1892), 68 L.T.N.S. 76; *Kay v. Field & Co.* (1882), 10 Q.B.D. 241; *Jones v. Adamson* (1876), 1 Ex. D. 60; *Barret v. Dutton* (1815), 4 Camp. 333; *Lord v. Davidson* (1885), 13 S.C.R. 166; Carver's Carriage of Goods by Sea, 3rd ed., p. 272.

*Aylesworth*, in reply.

September 14. Moss, C.J.O.:—The plaintiffs' claim is that on or about the 23rd of November, 1901, the defendants chartered the plaintiffs' steamship *Midland Queen* to proceed to Fort William and take therefrom a full cargo of grain for the defendants to the port of Goderich; the cargo to be loaded at Fort William on or before noon of the 5th of December, 1901; and that, in accordance with the charter, the *Midland Queen* proceeded to Fort William, and arrived there on the 3rd of December, and was, from her arrival until noon of the 5th of December, prepared and ready to receive the stipulated cargo, but the defendants neglected and refused to load the said cargo on or before the time agreed upon, and she was compelled to leave Fort William light, whereby the plaintiffs lost the freight and suffered other damage.

The defendants deny these allegations; and by way of, counter-claim set up that in November and December, 1901, they were possessed of 102,000 bushels of wheat in store in the Canadian Pacific Railway Company's elevators at Fort William, and according to mercantile usage and the plaintiffs' knowledge, the only way of loading such wheat for shipment by water was into vessels lying alongside the elevators, the wheat being conveyed from the elevators to the vessels by spouts, the elevators being, as plaintiffs well knew, the only places at the port of Fort William from which grain can be loaded into vessels; that about the 23rd November, 1901, the defendants chartered the *Midland Queen* from

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plaintiffs to proceed to Fort William, receive from the elevators and take to the port of Goderich 102,000 bushels of wheat, and it was a term of the contract, that the vessel should arrive and be at the elevators ready to receive her cargo on or before noon of the 5th of December; that defendants were at all times ready and willing to load the said wheat on the vessel, but she did not proceed to or report at the said elevators to receive the said wheat on or before the said date or at any time; that the time named for the arrival of the vessel at the elevators was an essential part of the contract by reason of certain insurance stipulations, and that, owing to the plaintiffs' breach of the contract, the defendants were unable to ship the wheat, and thereby suffered damages.

In reply and defence to the counter-claim; the plaintiffs deny that the defendants had the wheat in store, as alleged, or that it was a term of the charter contract that the vessel should be at the elevators, but say, that if it was the defendants had not the wheat, and could not have loaded the vessel if she had been at the elevators; that it was the duty of the defendants to have provided proper accommodation for the loading of the vessel at Fort William on or before noon of the 5th of December, but they failed to do so; that the vessel arrived within the port of Fort William early on the 3rd of December, and promptly notified the defendants, but they did not provide her with a load, so that she was compelled to leave Fort William light on or just before noon of the 5th of December in order to retain her marine insurance.

Issue being joined, the action was tried by MacMahon, J., without a jury.

As the case developed at the trial, the controversy between the parties was reduced to the question of whether the defendants had performed their part of the contract by having, as it was shewn that they had, before and at the time specified for loading, a sufficient quantity of grain in the elevators at Fort William to have furnished a full cargo if the vessel had come under the spouts, or whether they were bound to go further and provide or secure for the vessel an unimpeded access to the spouts in time to enable her to load there within the time specified, or failing that, to load her by some other means



within the specified time. And this is the main question for decision on this appeal.

There is a further question: whether, if the defendants are liable at all, the damages awarded ought not to be reduced by the amount of the expense which would have been incurred by the vessel in carrying the cargo to Goderich.

In delivering judgment the learned trial Judge stated that these expenses should be deducted, but in settling the formal judgment the question was referred to him and he directed that no reduction should be made.

The learned trial Judge found for the plaintiffs and directed judgment to be entered for the plaintiffs for the sum of \$4,590, being the amount of the freight which would have been earned if the vessel had received her cargo.

The main facts are scarcely, if at all, in dispute. Both parties set up and rely upon a contract contained in a number of telegrams and some letters passing between one A. F. Read, of Montreal, who was admittedly acting for the plaintiffs, and one G. R. Crowe, of Winnipeg, with regard to whose position some doubt has been raised, but whom the learned Judge has found to have been acting for the defendants.

Two of the telegrams upon which a great deal of the controversy turns are dated the 23rd of November, 1901, and are as follows:—

(1) Read to Crowe: "Playfair confirms charter *Queen Fort William* to Goderich, loading about December 2nd, weather, ice permitting, four and a half cents bushel. Confirm."

(2) Crowe to Read: "We confirm *Midland Queen* four and half, Goderich, load *Fort William* on or before noon 5th December."

Following these was a letter from Read to Crowe, dated November 23, stating as follows: "Playfair wires confirming charter to you of steamer *Queen*, to load at *Fort William* before noon December 5th to Goderich, at four and a half cents per bushel. Please say who she is to be loaded account of and to whom captain will apply for grain." This letter, which expressed the plaintiffs' understanding of the terms of the contract and their acceptance of them, was received by Crowe and by him handed or read, or the contents stated, to Frederick

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Phillips, the defendants' general manager at Winnipeg, and was accepted without objection.

The plaintiffs' vessel sailed for Fort William on the 30th November, and her departure was notified by Read, and Playfair, the plaintiffs' manager, to Crowe at Winnipeg.

In the fall of 1901 there were at Fort William three working elevators, the property and under the control of the Canadian Pacific Railway Company, and beyond doubt fully answering the description of terminal warehouses within the definition of the Manitoba Grain Act, 63-64 Vict. ch. 39 (D.). They were situate up stream three-quarters of a mile or more from the mouth of the river. The one nearest the mouth was known as elevator C. About 200 feet further up was elevator A, and 1,000 or more feet further on was elevator B. There was also a steel or tank elevator situate still further up stream, but this was not available in December, 1901.

There are no special berths for vessels, but along the north bank of the river is a long continuous dock with a line of posts to which the vessels may tie up. And by the established practice of the port all vessels, except the Canadian Pacific Railway Co.'s passenger steamers, are required to wait their turn and come up to the elevators in the order of their arrival in the river.

The only method of loading vessels with grain at Fort William was through the spouts of the elevators, and a vessel of the capacity of the *Midland Queen*, i.e. about 103,000 bushels, could be loaded in eight or nine hours from the time she came under the elevator spouts.

Upon the arrival of a vessel the captain reported to the person in charge of the elevators, and without this person's leave the captain could not bring his vessel under the spouts of the elevator.

In the fall of 1901 the elevators were in charge of one Sellars, to whose orders the vessels were subject as regards the order and time of their coming to load.

The *Midland Queen* arrived and tied up along the bank of the river on the afternoon of Tuesday, the 3rd of December. At that time of the year—within a couple of days of the close of the season—there is always a number of vessels waiting

their turn, and there were eight vessels ahead of the plaintiffs' in course of being loaded or awaiting their turn at the elevators.

The plaintiffs' vessel was insured under two policies, in each of which was contained a warranty that she should not be engaged in navigation from December 5, 1901, to April 1, 1902, but in the event of her being on a voyage at noon on the 5th of December, 1901, (Chicago time), the policy was to continue until arrival at port of destination.

This was not made known to the defendants, but they were aware that the usual condition of insurance on hulls was to that effect.

The defendants were covered by open policies on all shipments up to, and inclusive of, the 5th of December, in vessels reporting at an elevator ready to load at or before six o'clock in the afternoon, but this was not known to the plaintiffs, otherwise than as they may have been aware of the general conditions of insurance upon cargoes carried on the upper lakes.

It may not be very material to the real question between the parties, but upon the evidence it should be found that the captain of the plaintiffs' vessel reported to Sellars soon after his arrival. His account of this is circumstantial and is not overborne by Sellars' denial. However, it seems clear that the vessel's position and priority in the line of arrived vessels was not prejudiced by Sellars' failure to remember the fact of being notified in the afternoon of the 3rd December.

On the same afternoon Reese, the defendants' agent at Fort William, met the captain and had a conversation with him. Reese had been informed by the defendants that the vessel was to come to Fort William, but he knew nothing of the terms of the contract until he spoke with the captain.

They then discussed the probabilities of getting the vessel loaded by noon of the 5th. They were agreed that it was unlikely that it could be done in consequence of the number of vessels ahead, and Reese suggested that he would wire the defendants to see if they could not get the vessel loaded at Port Arthur. He despatched a telegram to the defendants, saying: "*Midland Queen* here. Big fleet ahead of her. Can you arrange load her at Port Arthur."

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Then ensued some telegrams about seeing what could be done if the rate was reduced, but it all came to nothing, for Phillips, the defendants' manager, was unable to arrange with the Canadian Pacific Railway Company to move wheat to Port Arthur or to get special arrangements for loading at the elevators.

On the morning of the 5th, the vessel had in due course reached a place in the river where she was within about 300 feet of elevator C. There was a vessel (the *Rosedale*), at the spouts, and the plaintiffs' vessel was next in order for them.

It was supposed that the *Rosedale* would complete her loading about 9.30 in the morning. Before that hour, Sellars told the captain of the plaintiffs' vessel that they could not fully load her before noon, but proposed that she should come under the spouts and he would start her load before dinner so as to save the insurance, and complete her that night. He knew that the vessels were hastening to get away before noon to save their insurance.

At first the captain seemed disposed to meet the suggestion, but finally, on receipt by him of a telegram from the plaintiffs ordering him home, he left for Collingwood shortly before eleven o'clock, it being apparent, of course, that she could not load before noon.

From the time of her arrival until her departure both parties appear to have been exerting themselves to the utmost to get the vessel loaded.

The plaintiffs claim that the failure to do so was due to the defendants' default.

The defendants, on the other hand, claim that they did everything that the contract required and had the cargo at the place of loading, ready to be loaded into the vessel before the time named in the contract; and that the failure to do so was owing to the default of the plaintiffs in not having their vessel at the place of loading, ready to take her cargo on board within the time specified in the contract.

The defendants' duty under the contract was to furnish a cargo of wheat at the place of loading agreed upon, and upon the evidence it is beyond question that the place of loading contemplated and agreed upon by both parties was the elevators.



There was no thought or intention in the minds of either of loading by any other means than through the elevator spouts. In fact, there was no other method of loading vessels with grain at Fort William, and this was perfectly well understood by the parties at the time of making their agreement.

In the contract in question, where the parties speak of Fort William, they must be deemed to be speaking of the elevators as the defined place at which the loading was to take place. And the proper way to read it is, as if the words "at the usual place" were in the contract, for that is in effect what the parties contracted for.

The plaintiffs contract, therefore, was to proceed to the usual place of loading, *i.e.*, the elevators: and there receive the cargo and carry it to Goderich, the point of destination.

The defendants' contract was to have a cargo of grain at the elevators, ready to deliver so as to enable the loading to be completed within the time limit. A question has been made as to the time at which the loading was to be completed: whether the contract required that it should be completed at or before noon of the 5th December: or whether it called for more than that the loading should be commenced at or before that hour.

It must be taken that Crowe's telegram to Read of the 23rd November, "We confirm *Midland Queen* four and a half, Goderich, load Fort William on or before noon," was despatched on behalf of the defendants, and that the language was theirs or was adopted by them. Read's letter of the same day shewed his understanding of that telegram, and if the defendants' understanding was different, it was their duty to have drawn attention to it and have the matter put right before it was acted upon.

The telegram and letter, fairly read, convey the meaning that the vessel was to get her load by noon; that is, that the defendants were to have the cargo at the elevators, ready to deliver within such reasonable time before noon of the 5th, as to enable the vessel to be loaded by that time. In that respect the defendants have made no default, for it is now beyond question that they had the grain at the elevators, and that the vessel could have been loaded in good time, if she had come to them.

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No liability as to loading attached to the defendants. The law in this respect appears to be as stated by Brett, L.J., in *Nelson v. Dahl*, 12 Ch. D. 568 at p. 582: "The primary right of the charterer as to loading under a charter-party in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charter-party as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled, the liability of the charterer begins."

In the present case, if the true construction of the contract is that the place of loading was the elevators, then the vessel was never at the place named in the charter-party, as the place whence the carrying voyage was to begin.

The plaintiffs, however, contend that, not only were the defendants to have the cargo at the elevators ready to deliver within a reasonable time before the expiry of the time, but they were also bound to have and keep a clear road to the elevators, so as to enable the vessel to reach the elevators in sufficient time to enable her to receive her load before the expiry of the limit.

It may be that if the elevators and the ways were the defendants' property, that would have been their duty. They would certainly not be justified in keeping obstructions in the vessel's way. But, to the knowledge of both parties, the elevators were terminal warehouses, not in any manner under the control of the defendants, and all vessels arriving were subject to the custom or practice of the port, by which they must load in turn; though, even if the custom was not known to them, it would make no difference.

In *Postlethwaite v. Freeland*, 5 App. Cas. 599 at p. 613, Lord Blackburn said, referring to a charter-party which contained a reference to the custom of the port: "I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charter party in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be, see

*Hudson v. Ede*, (1867), L.R. 2 Q.B. 566, though it was expressly found in that case that the shipowner and his broker were not aware of the usage." Later on, Lord Blackburn approved of the direction of Lord Coleridge to the jury that "custom" in the charter-party did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port.

The settled and established practice at Fort William in regard to loading vessels with grain is clearly shewn to be, to load at the elevators in their turn. The defendants did nothing to cause any obstruction to the plaintiff's vessel or to prevent her from reaching the elevators and being loaded according to the custom.

The principle that has been applied in regard to discharging where, by the custom of the dock, the work was done by third parties independent of both the shipowner and the charterer, as in *The Jaederen*, [1892] P. 351, ought in reason to be applicable to loading.

The plaintiffs having failed to shew that the defendants were in default, are not entitled to succeed against them, and their action should have been dismissed.

It follows that the plaintiffs, having failed to perform their part of the contract, are liable for the consequences of the breach, unless they can excuse themselves on the ground of prevention by the other vessels. But they were aware, when they made the contract, of the chance of there being a block of vessels awaiting their turn for the last trip, and must be regarded as having undertaken the chances resulting from that condition of affairs. Their insurance was liable to be ended unless they were on a voyage at noon on the 5th December; and knowing that, and the probability of a block at Fort William, they should have made sure of the arrival of the vessel in time to enable her to load in time. And not having done so, and having departed without the cargo, the defendants are entitled to whatever damages they can shew to be such as may be considered to have fairly resulted from the breach of the contract, and to have been in the contemplation of the parties.

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The defendants make claim for loss of interest on the price of the cargo, for insurance, for extra freight, and for depreciation in price.

They were relieved by McGaw, the purchaser, from the contract they had made to deliver the grain at Goderich, and they were, therefore, not called upon to forward the grain by other means of conveyance at an increased rate, and no charge on that account can be maintained. The damages are, therefore, to be measured by the injury suffered by the cargo being left on the defendants' hands: Mayne on Damages, 6th ed., 309.

It appears, that the price that was to be paid by McGaw was regulated by the price of Chicago May wheat, and although the defendants say there was a loss to them of profit by reason of such sale being given up, their manager, Mr. Phillips, was unable to put it into figures.

Besides, the defendants disposed of a considerable part, if not all, of the quantity to be carried, at the elevators or at Fort William, not long after the plaintiffs' breach, at figures which Phillips rather vaguely puts at from three to four cents a bushel below the price on the 5th of December; but he furnishes no satisfactory data, and, on the evidence, it is not possible to say that the price realized was not equal to the price to be ultimately paid at Goderich, less the four and a half cents per bushel for freight.

The fact of the sales, and that Mr. Phillips found it impossible to separate the grain intended for Goderich from the other grain in the elevators, upon which he had to pay storage and insurance, reduce the claim for interest, storage and insurance to a small sum, which does not appear to be capable of separation from the other claims, and the amount of which is not stated.

On the whole, in view of the circumstances and the nature of the evidence on the question of damage, the defendants should be confined to nominal damages for breach of the contract—say, \$50.

The appeal is allowed, and the plaintiffs' action is dismissed with costs. There will be judgment for the defendants on their counter-claim for \$50 damages, with costs.

The plaintiffs must pay the costs of the appeal.



GARROW and MACLAREN, J.J.A., concurred.

MACLENNAN, J.A.:—I am of opinion that the judgment is right and should be affirmed.

The contract is found in the telegram from the defendants' agent, Crowe, of the 23rd November: "We confirm *Midland Queen* four and a half, Goderich, load Fort William on or before noon 5th December."

The port of Fort William is the outlet of the river Kaministiquia, and is about 300 feet in width, extending from the lake up the river about a mile. There is a continuous line of wharf along the north-east shore for about a mile. There are three elevators, each about 350 feet in length, from which grain is loaded into vessels. They are erected upon the wharf, about half a mile up the river, and are designated respectively, C, A and B—C being nearest to the lake, A next, and B farthest up the stream. Between C and A there is an interval of about 250 feet, and between A and B an interval of from 1,000 to 1,200 feet.

Vessels are loaded by means of spouts from any or all of them, and a vessel may be loaded partly from each.

In the present case, Mr. Sellars, who was in charge of the elevators, says he could have loaded the plaintiffs' ship on the 5th of December with from 2,000 to 5,000 bushels from C, which would have emptied that elevator, and she would then have had to proceed to A, where she would *very likely* have got the remainder of her cargo of 102,000 bushels.

The plaintiffs' ship arrived at Fort William from Midland on the afternoon of the 3rd of December, and the learned Judge finds, and I think properly, that her arrival was immediately notified to the defendants' agent, and also to Mr. Sellars, who was in charge of the elevators.

There were, however, six other vessels in port before her, waiting to be loaded, and the loading of which prevented the plaintiffs' ship from being loaded within the time named in the contract, the hour of noon on the 5th of December. In consequence of this the plaintiffs' ship was obliged to sail without cargo, at the peril of her insurance expiring at noon on that

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day, in the event of her being in port and not upon a voyage at that hour.

The contention of the defendants is, that the plaintiffs' ship not having come under the spouts of the elevator in time to be loaded before noon, they had broken their part of the contract, by reason whereof, not only were they precluded from recovering damages from the defendants, but that they became liable to pay damages to the defendants, which they sue for by counter-claim. The defendants also contend that by the true construction of the contract, the word *load* used therein meant no more than commencing to load, which, it is admitted, might have been commenced by the hour of noon. With regard to this last contention, I think it is too clear for argument and well settled by authority, that "load" must be taken to mean the completion of the loading, and not merely its commencement.

As to the other contention, it is said that it was not sufficient for the ship to arrive in port and to make known her arrival there, but that she must have come to the very spot where she was to receive her load. But it is apparent that this cannot be so. The plaintiffs did not, and could not, know in which of the elevators the defendants' grain was stored, nor from which of them she was to receive her cargo. That was information which had to be communicated to them by the defendants after arrival at the port.

It was also said that the plaintiffs were bound to arrive in such time, that their ship would have such precedence over other ships that she would be certain to receive her turn and her cargo before noon. I am unable to put that construction upon the contract.

It may be conceded, that the plaintiffs are affected by knowledge that the custom was that vessels were loaded in turn, according to the order of their arrival in port, with the exception of the steamers of the Canadian Pacific Railway Company, but there is no reference to that in the contract, and the time limit for loading, expressed in the contract, neither expresses nor implies any qualification by reason of that custom. In my opinion, the true construction of the contract is, that conceding

the custom, the defendants would complete the loading within the time named.

To construe it otherwise, would mean, that the plaintiffs were to be loaded by noon only in the event of the elevator containing the defendants' grain being clear in sufficient time for that purpose, and if not that the defendants were not bound to load her at all.

I think the citations made by the learned trial Judge from the authorities establish, that where the contract contains an unqualified time limit for loading on the part of the charterer, and the ship has arrived at the port in sufficient time, the charterer is answerable for not loading within the time, whatever be the nature of the impediment which prevents him from performing it. I refer to the citations from *Postlethwaite v. Freeland*, 5 App. Cas. 599 at p. 618; *Randall v. Lynch*, (1809), 2 Camp. 352; *Budgett & Co. v. Binnington & Co.*, [1891] 1 Q.B. 35, at p. 40; *Davies v. McVeagh* (1879), 4 Ex. D. 265; *Tapscott v. Balfour*, L.R. 8 C.P. 46; *Pyman Brothers v. Dreyfus Brothers & Co.*, 24 Q.B.D. 152.

It was argued that the cases of *Postlethwaite v. Freeland*, *supra*, and *Dahl v. Nelson*, 6 App. Cas. 38, were favourable to the defendants. I do not think so. The contract in the first case was, that the cargo was to be discharged "with all despatch, according to the custom of the port;" and it was held that having been discharged with diligence, so far as the means available at the port enabled it to be done, the charterer was not liable for delay.

In *Dahl v. Nelson* the contract was to proceed to certain docks, or as near thereto as she might safely get and lie afloat. The dock was occupied, and entrance was refused by the dock authorities. The ship was then taken as near as she could safely get, and unloaded by the master by means of lighters, and it was held he was warranted in so doing. There was no time limit in either of those cases; and, in my opinion, they are no authority for the contention of the defendants.

Another circumstance, which makes it clear that the plaintiffs could not know, without information from the defendants, from which elevator or elevators they were to be loaded, is this:

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the grain of different owners is not kept distinct in the elevators, but there are several different grades of grain, and the grades are kept distinct. The plaintiffs could not know, without information, of what grades the defendants' grain consisted, whether all of one grade or of several different grades, any more than they could know in which of the elevators it was stored.

Upon the whole, I am of opinion that the plaintiffs were in no default; that the defendants were bound by the time limit in the contract; and, having failed to load the plaintiffs' ship within that time, are liable for the loss suffered by the plaintiffs.

G. A. B.

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[IN CHAMBERS.]

RE KINNY.

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Oct. 22.

*Will—Charitable Devises and Bequests—Designation of Beneficiaries—Perpetuities—Mortmain Acts.*

Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Churchtown . . . Ireland. The presiding clergyman, committee, and elders to have full control of all after me. They shall have the power to sell or rent to the best advantage. . . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, committee, and ruling elders having succeeding authority to remember the poor of the church at Christmas every year and to cheer the poor and the broken hearted with the joy of Christ's death and suffering, together with the presents presented by the minister, committee, and ruling elders at the Christmas time every year." By a codicil he appointed two persons executors and trustees and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months after making the will and codicil, leaving both real and personal property:—

*Held*, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently designated, and came within the meaning of sec. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. ch. 2 (O.); and, the gifts being charitable, the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect.

*Held*, also, that the word "assurance" in sub-sec. 6 of sec. 7 of that Act refers to a deed, not to a will, and therefore leaves sec. 4 of R.S.O. 1897, ch. 112, untouched, and under that section a devise in favour of a charity is good though made within six months before testator's death.

APPLICATION by the executors under Rule 938 for an order declaring the construction of the will of Joseph C. Kinny, who died on the 4th February, 1903, having made his last will on the 12th December, 1902, and a codicil thereto on the same day.

The will and codicil were as follows:

"The last will and testament of me Joseph C. Kinny the second son of big Paul Kinny the carpenter & millright of the townland of Dungalady Parish of Maghera County Londonderry Ireland.

I bequathe all that my hevenly father has given me to that presbyterian congregation where I belong to & had my first communion Churchtown or better known by the name of Tamlaght O'Crilly Co. Derry, Ireland. The presiding clergyman, comitte & elders to have full controll of all after me. Théy shall have the power to sell or rent to the best advantage while grass grow or water run, it would be advisable to hold

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this 100 acre property in the Township of McKillop for 21 yrs. as I believe it would double itself in that time & be soe much more benefit to the congregation & the citty property to be sold 142 & 144 Lippincott St in the citty of Toronto & also moneys coming to me or in the bank & I wish my hevenly father to lenghen my days that I may go and be buried with my earthly father Paul Kinny in the old Churchyard Tamlaght O'Crilly Co. Derry Ireland The minister and Comittee & ruling elders shall give me a decent funeral monument not to exceed one hundred pounds Stg., & then the widow & the orphan & neglected children to be seen after by the minister, comittee & ruling elders having suceding authority to remember the poor of the church at Chrismass every year & to cheer the poor & the brokenhearted with the joy of Christs death & sufferings together with the preasants presented by the minister comittee & ruling elders at the Christmas time every year while grass grow & water run, in memory of J. C. Kinny in the townland of Dungalady.

formerly the Rev Robert Torans Gantade Cottage was our Minister when I was young.

Dated December 12th 1902.

Witnesses

W. J. Levy

Joseph C. Kinny.

S. M. Edwards

I will appoint Fredrick Herbert Thompson and Abrem Dent both of Mitchell in the County of Perth, Ontario, solicitors, the exeters & trustees of my last will above ritten & I hereby vest all my property in them as trustees for the purposes mentioned in said will. Dated December 12th 1902.

Witness W. J. Levy

Joseph C. Kinny."

Witness S. M. Edwards

The real estate of the testator devised by the will and codicil was of the value of about \$4,300, and the personal estate bequeathed amounted to \$1,700.

The deceased was unmarried, and his only heirs at law and next of kin were his three brothers, namely, Johnston Kinny, of the township of McKillop, in the county of Bruce, and John Kinny and George Kinny, both farmers residing in Australia.

The three brothers were all upwards of twenty-one years of age, and claimed to be entitled to the estate of the deceased.

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The opinion of the Court was asked: (1) As to whether the beneficiaries named in the will and codicil were sufficiently designated or definite; and (2) as to whether the devises and bequests were invalid by reason of the provisions of the Mortmain and Charitable Uses Act, 1902,—the testator having died less than six months after the making of the said will and codicil.

The motion was heard by MACMAHON, J., in Chambers on the 2nd October, 1903.

*H. W. Mickle*, for the executors.

*E. D. Armour*, K.C., for the Presbyterian congregation of Tamlaght O'Crilly.

*A. W. Holmested*, for the next of kin of the testator.

October 22. MACMAHON, J. (after stating the facts as above):—By the codicil, the testator appointed Frederick Herbert Thompson and Abraham Dent the executors and trustees of his will, and vested all his estate both real and personal in them as trustees.

The general charitable intent of the testator is manifest from the whole tenor of the will. The devises and bequests in the will are to certain members of the Presbyterian congregation, those particularly designated as beneficiaries being, “the widows, and neglected children, and the poor;” and the minister, the committee, and elders of the church, are the almoners named in the will for the purpose of carrying the testator's charitable design into effect.

The Mortmain and Charitable Uses Act, 2 Edw. VII. ch. 2, sec. 6 (O.), provides that “the following shall be deemed to be valid charitable uses within the meaning of this Act viz.: the relief of aged, impotent, and poor people; . . . the support, aid and help of . . . persons in poor circumstances; . . . and any other purposes similar to those hereinbefore mentioned.”

The beneficiaries, are, I consider, sufficiently designated, and come within the meaning of the above sixth clause of the Act of 1902. And if so, the gifts being charitable gifts, the

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rule against perpetuities does not apply to them. In *Goodman v. Mayor of Saltash* (1882), 7 App. Cas. 633, at p. 642, Lord Selborne, L.C., said: "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or any particular class of such inhabitants, is (as I understand the law) a charitable trust; and no charitable trust can be void on the ground of perpetuity." See also *Attorney-General v. Comber* (1824), 2 Sim. & Stu. 93; *Attorney-General v. Clarke* (1762), Amb. 422.

Then, dealing with the second question submitted, as to whether the devises and bequests are invalid by reason of the provisions of the Mortmain and Charitable Uses Act, 1902, the testator having died less than six months after the making of the said will and codicil.

The Act relating to Mortmain and Charitable Uses, R.S.O. 1897, ch. 112, sec. 4, provides that "land may be devised by will to or for the benefit of any charitable use," etc.

There is nothing in this Act making a devise of land in favour of a charity invalid unless the will was executed not less than six months before the death of the testator.

By the Mortmain Act of 1902 (2 Edw. VII. ch. 2) it is provided (sec. 1) that the Act shall be read as part of the Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, and by sec. 2, sub-sec. 1, of the former Act, "assurance" includes a devise, bequest, and every other assurance by deed, will or other instrument.

And sec. 7 (1) provides that, "subject to the provisions of the Revised Statutes chapter 112, and to the savings and exceptions contained in this Act . . . every assurance of land to, or for the benefit of, any charitable uses, and every assurance of personal estate to be laid out in the purchase of land, to, or for the benefit of, any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void."

Counsel for the heirs at law of the testator relied on sub-sec. 6 as rendering invalid the devises and bequests in favour of the charities by reason of the testator having died within six months' of the making of the will. That sub-section reads as follows:

"If the assurance is of land, or of personal estate, not being stock in the public funds, then, unless it is made in good faith



for full and valuable consideration, it must be made at least six months before the death of the assurator, including in those six months the days of the making of the assurance and of the death."

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That section refers to the case of a deed, as the "assurance" there referred to is required to be made "for full and valuable consideration," which cannot have any application to a will.

Section 4 of ch. 112, R.S.O., as to devises of land by will for charitable uses, therefore remains untouched, and a devise under that section in favour of a charity would be good if made on the very day of the testator's death.

There will be a declaration that according to the true construction of the will and codicil the trusts created and the beneficiaries named in the will and codicil, are sufficiently defined and designated; and that the devise by the testator of his real estate and the bequest of his personal estate by the said will are valid.

The costs of all parties will be paid out of the estate, those of the executors as between solicitor and client.

T. T. R.

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[BRITTON, J.]

1903

Oct. 19.

## CENTRAL TRUST CO. OF NEW YORK V. ALGOMA STEEL CO.

*District Courts—Jurisdiction—Recovery of Land—Mortgages—Injunction—High Court Action—Multiplicity.*

The plaintiffs, being mortgagees of land, issued out of the district court for the district in which the land was situated a writ of summons indorsed with a claim to "recover possession" of the land "and for an order that the defendants do forthwith deliver up possession" thereof, describing the land:—

*Held*, that the indorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R.S.O. 1897, ch. 109, sec. 9, sub.-sec. 2 (d).

*Independent Order of Foresters v. Pegg* (1899-1900), 19 P.R. 80, distinguished. The fact that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief as in the other action, was not a ground for enjoining the plaintiffs from proceeding in the district court.

MOTION by the defendants in the above (and also in three other actions brought by the same plaintiffs against different companies) to continue an interim injunction restraining the plaintiffs from proceeding further with certain actions brought by them against the same defendants in the district court of Algoma to recover possession of lands in the town of Sault Ste. Marie on which the buildings of the defendants were erected, upon default being made in mortgage securities held by the plaintiffs.

The motion was heard by BRITTON, J., in the Weekly Court, on the 13th October, 1903.

*G. F. Shepley*, K.C., and *W. E. Middleton*, for the defendants. The district court has no jurisdiction to entertain actions for the recovery of land exceeding \$200 in value where the recovery is part of the realization of the security. See the Unorganized Territory Act, R.S.O. 1897, ch. 109, sec. 9, and the County Courts Act, ch. 55, secs. 22, 23. There is a difference between an action of ejectment and an action for the enforcement of a security by getting possession: Con. Rules 138 (f), 141, 603; *Independent Order of Foresters v. Pegg* (1899-1900), 19 P.R. 80; *Hay v. McArthur* (1880), 8 P.R. 321; *In re*

*Henry Pound, Son, & Hutchins* (1889), 42 Ch. D. 402, 422-3. Where prohibition will lie, there is a right to enjoin the plaintiffs from proceeding: *Hedley v. Bates* (1880), 13 Ch. D. 498, 502. The plaintiffs, having brought these actions in the High Court, can obtain therein all the relief they are seeking in the district court, and should on that ground be enjoined from proceeding in the inferior court: *Hedley v. Bates*, *supra*; *Stannard v. Vestry of St. Giles* (1882), 20 Ch. D. 190.

*C. H. Ritchie*, K.C., *J. Bicknell*, K.C., and *J. W. Bain*, for the plaintiffs. There is no jurisdiction to enjoin in respect of proceedings in an inferior court: *Fitzsimmons v. McIntyre* (1869), 5 P.R. 119; *Bicknell & Seager's Division Courts Acts*, 2nd ed., p. 63; *Carter v. Fay*, [1894] 2 Ch. 541; *McLeod v. Noble* (1897), 24 A.R. 459. This is not an equitable action, but an action of ejectment: *Cole on Ejectment*, 2nd ed., p. 14; *Grey v. Manitoba and North-West R.W. Co.*, [1897] A.C. 254, 264.

October 19. BRITTON, J.:—Motion by the defendants to continue an injunction granted restraining any proceedings by the plaintiffs in the district court of the district of Algoma for the recovery of the land covered by the mortgages in reference to which this action has been brought.

The plaintiffs on the 29th September, 1903, commenced proceedings, by writ issued out of the district court of the district of Algoma. The writ was specially indorsed as follows:—

“The plaintiffs’ claim is to recover possession of all and singular those certain parcels or tracts of land and premises particularly described as follows” . . . (description of the land as in a mortgage to the plaintiffs).

“And for an order that the defendants, their servants, workmen, and agents, do forthwith deliver up possession of the said lands and premises to the plaintiff Benjamin Franklin Fackenthal junior, receiver appointed by the plaintiffs the Central Trust Company of New York, under and in pursuance to the mortgage or deed of trust dated 1st January, 1903, and made between the defendants and the said plaintiffs the Central Trust Company of New York.”

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Upon the affidavits filed it is difficult to understand why it was deemed necessary for the plaintiffs to take the proceedings in the district court, as they could have had and now have an injunction restraining the defendants from dealing with the property to the prejudice of the plaintiffs, but the only questions for my consideration on the present motion are :

1. Has the district court of the district of Algoma jurisdiction in such an action for the recovery of possession of land ?

2. If it has, as the plaintiffs have brought this action in the High Court, where they are asking for practically all that they claim to be entitled to, under the mortgage, and where there is unquestioned jurisdiction to give full relief, including possession, should they be allowed to continue proceedings in the district court for possession only ?

The plaintiffs claim jurisdiction for the district court under R.S.O. 1897, ch. 109, sec. 9, sub-sec. 2 (*d*).

Section 9 is in part as follows :—

(1) The said district courts shall have the same jurisdiction as is possessed by county courts.

(2) The district court . . . of Algoma . . . shall, in addition to the jurisdiction conferred by sub-section 1 . . . have jurisdiction to hold plea, subject to appeal

(*d*) For the recovery of land situate in the district.

Is an action by a mortgagee for the possession of land included in the mortgage, an action “for the recovery of land,” within the meaning of the Act above cited ? If it is, the district court has jurisdiction.

If the writ had been indorsed under Rule 141, claiming foreclosure, that claim would at once have ousted the district court of jurisdiction, or rather would have shewn that the district court had no jurisdiction to grant the relief asked upon such a mortgage. If the indorsement was, or ought to have been, such as is required by the Rules to be in the form prescribed, part 2, sec. 6, then it would be a suit for sale, asking for immediate possession pending the sale ; it would be more than a suit for the recovery of land, and neither the district court nor any county court would have jurisdiction.

The writ was indorsed for an order that the defendants forthwith deliver up possession. The plaintiffs’ claim was



simply to recover possession. That, I think, is only "for the recovery of land," within the meaning of the Act cited. "Recovery" may mean more than "recovery of possession." If it does, the greater includes the less.

In *Independent Order of Foresters v. Pegg*, 19 P.R. 80, the question was only as to when a writ can be said to be specially indorsed under Rule 138 so as to entitle the plaintiff to move under Rule 603 for summary judgment for recovery of land. In that case Mr. Justice Osler said (p. 87): "It cannot, therefore, be affirmed that the action for the recovery of land under Rule 138 (*f*) is the same kind of action as one under Rule 141 for the foreclosure of a mortgage and the immediate delivery of possession as incident thereto."

I therefore conclude upon the mere question of jurisdiction:—

1. That the indorsement in the case in the district court was an indorsement under Rule 138.

2. That it was for "recovery of land," within the meaning of the Act giving jurisdiction to the district court.

Sub-section 3 of sec. 9 of ch. 109, R.S.O., assists in determining the intention of the Legislature upon the question of jurisdiction.

It provides that after a trial for the recovery of land, any party entitled to move to set aside or vary the verdict or judgment, may, instead of moving in the district court, and without removing the cause into the High Court, move in the High Court, etc. It was evidently intended to open wide the door as to jurisdiction.

I ought not to continue the injunction upon the second ground. It is certainly contrary to the policy of the Court, as law is now administered, to permit an action of ejectment and afterwards an action for sale. See *Hay v. McArthur*, 8 P.R. 321. This suit is not for foreclosure or sale; it is for a declaration as to plaintiffs' rights; and, if I am right in deciding that the action in the district court is only for recovery of land, and is within the jurisdiction of that court, I ought not to restrain further proceedings there, merely because the plaintiffs could have their complete recovery in the present action.

Britton, J.

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The mere question of immediate possession cannot, under the special and unfortunate circumstances now existing, matter much to either party. The plaintiffs are mortgagees in fact, and must account for their dealings with the property, if the defendants are able to redeem; and the defendants in the present action have the right to attack the mortgage, if open to valid legal objections. If the defendants remain in possession, they are so under injunction as to dealing with the property, and practically are caretakers for the plaintiffs.

The injunction should be dissolved. Costs to be costs in the cause.

E. B. B.

## [DIVISIONAL COURT.]

TODD

v.

THE CORPORATION OF THE TOWN OF MEAFORD.

D. C.

1903

Jan. 6.

Sept. 22.

*Railway—Agreement to Purchase Land—Taking Possession—Non-payment of Purchase Money—Landowner's Remedy—Arbitration—Action—Expected Profits—Measure of Damages—63 Vict. ch. 77 (O.)—51 Vict. ch. 29, sec. 131 (D.)*

In carrying out the agreement provided for in 63 Vict. ch. 77 (O.), an Act respecting the Town of Meaford, the town agreed with the plaintiff for the purchase of and possession by the railway company of the portion of the plaintiff's land required by the company, but without fixing the price.

The company, pursuant to sec. 131 of "The Railway Act," 51 Vict. c. 29 (D.), deposited a plan, profile and book of reference of the land required in the county registry office, which was approved by the Railway Committee, shewing the plaintiff's lands entered upon it, and completed the work.

The purchase money not having been agreed upon, or paid, plaintiff brought an action against the town and the railway company for damages to the land, and for interference with his business, whereupon the town paid into Court \$375.50, and set up, by way of defence, that plaintiff's remedy was by arbitration under the Municipal Act :—

*Held*, that the defendants, the town, were not liable, and that the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action, and that the money in Court should be paid out to him without prejudice to his right to proceed further against the company.

Judgment of Falconbridge, C.J., varied.

THIS was an appeal from a judgment of Falconbridge, C.J.K.B., at the trial of an action brought by one A. C. Todd against the corporation of the town of Meaford and the Grand Trunk Railway Company of Canada.

The two defendants, the municipal corporation and the railway company, had entered into the agreement set out in the statute 63 Vict. ch. 77 (O.), and the railway company had, pursuant to the provisions of the Railway Act, 51 Vict. ch. 29 (D.), deposited a plan, profile and book of reference of the lands intended to be taken, in the registry office of the county, which had been approved of by the Railway Committee, and the plaintiff's land was therein set out and described.

Subsequently the plaintiff signed an agreement or option (set out in the judgment of the trial Judge). The railway company took possession and completed their works, and the

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price not having been agreed upon or paid, the plaintiff brought an action of trespass, claiming damages for the land and interference with and injury to his property and business.

The defendants, the municipal corporation, denied all liability, and among other defences set up that the plaintiff's remedy was by way of arbitration, under section 437 of The Municipal Act, R.S.O., 1897, ch. 223, and not by action; and a tender after action brought of \$350 and interest and costs; and paid into Court \$375.50, and offered to pay plaintiff's costs.

The defendants the company, among other defences, pleaded "not guilty" by statute; that they entered on the lands with the plaintiff's consent and under the agreement; claimed the benefit of the money paid into Court by the corporation and of the Railway Act; and that if the plaintiff had suffered damage he should proceed for the recovery of compensation under that Act, and not by action.

The action was tried at Owen Sound on the 2nd, 3rd, and 4th of December, 1902, before FALCONBRIDGE, C.J., without a jury.

*E. E. A. DuVernet and Grayson Smith*, for plaintiff.

*Clute*, K.C., and *J. S. Wilson*, for the corporation of Meaford.

*Shepley*, K.C., and *W. H. Biggar*, K.C., for the Grand Trunk Railway Company.

January 6. FALCONBRIDGE, C.J.:—The learned counsel engaged in this case pressed on me with much skill and erudition the consideration of several matters relating to the position of the parties and the propriety of the plaintiff's choice of a forum; which matters it will not be necessary for me to pass upon, having regard to the view which I take as to the measure and *quantum* of the damages or compensation.

Whatever might otherwise have been the position of defendants or either of them, when the work was proceeded with on plaintiff's land, I cannot see how defendants, or either of them, can be considered as trespassers in view of what took place at that time on the property.



Messrs. Gardner and Trout, acting on behalf of the town, took from the plaintiff an instrument under seal, in form an option to or agreement with the Grand Trunk Railway Company, as follows:—

*“The Grand Trunk Railway Company of Canada.*

“Know all men by these presents that I, A. C. Todd, of the town of Meaford, in the county of Grey, have and hereby do agree with the Grand Trunk Railway Company of Canada, as follows:—

“That I hereby agree to sell and convey to the said company so much of my land situate in the town of Meaford, in the county of Grey, on the line of their railway between the main line and the harbour, and being part of block “C” in the said town of Meaford, which land is shewn by a plan now produced and shown to me by James Gardner and James Trout, for the price or sum of five hundred dollars—James Gardner and James Trout not recommending over two hundred dollars—the deed with an accurate description of the land taken, to be prepared by and at the expense of the said company; a clear title to be given and money paid on the execution and delivery of the deed. I consent in the meantime to the company proceeding with their works on the said land without prejudice to the said A. C. Todd.

In witness whereof I, the said A. C. Todd, have hereunto set my hand and affixed my seal this third day of October in the year of our Lord one thousand nine hundred,” to which plaintiff says was attached—

*“Copy of Memo. Annexed to Option.*

“Provided that the acceptance of the said sum of \$500 is for the value of the land so taken, and is without prejudice to whatever rights, I, A. C. Todd, may have against the G.T.R. or town of Meaford, or both, to recover compensation for loss sustained by flooding (if any) owing to the diversion of the Big Head River.”

What is the meaning of the words “without prejudice to the said A. C. Todd.” It is now seriously contended that it is; “I consent in the meantime to the company proceeding with their

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works on the said land, without prejudice to my being at liberty to treat the said company as trespassers, in the event of this offer not being accepted."

I cannot think this to be a reasonable construction. Let it be remembered that at once—*eo instanti* of the signing—defendants' contractors set to work on the place, plaintiff accompanying them and making requests, and giving instructions as to the change of position of a post, to which was attached a wire by way of guy for his chimney.

I am further of the opinion that the defendants, the town of Meaford, have paid into Court enough to satisfy the plaintiff's claim, and I so find—*i.e.*, enough to cover the fair value of the land taken and damage done to what is left according to any reasonable scale or measure.

The change in the river has lessened instead of increasing the danger of the land being flooded, because the channel has been deepened, and the curves eased, permitting a freer flow of water in times of freshet. The harbour now is at lake level up to above this point, which must be, on the whole, an advantage and not a disadvantage to the plaintiff.

The principal item of damage claimed is based on the theory, that the plaintiff's business has been and is an increasing one, and that the expropriation of land not belonging to him has prevented him from purchasing that land and erecting additional buildings, and so extending his business.

This element of damage is not suggested at all in the letter from plaintiff's former solicitor to the town, of 23rd June, 1900, and is put forward in the statement of claim with reference only to the extension which would have been possible on the land which plaintiff originally owned.

It is quite plain, on plaintiff's own evidence, that no substantial extension was commercially feasible on the land which plaintiff owned (including what defendants have taken from him). Even if it had been, I hold that the expected increased profits, by the enlargement of buildings and plant on his own land, would be too speculative and uncertain, and would form no true measure of damage. The subject is well discussed in *Hamilton v. The Pittsburg, Bessemer and Lake Erie Railroad*

*Co.* (1899), 190 Pa. St. 51; and see *The Queen v. Fowlds* (1893), 4 Ex. C.R. 1.

But here is an *a fortiori* case, viz., the fact, that the plaintiff would have to negotiate for, and buy, adjoining land of another proprietor, to make any substantial extension, and the introduction of this new element of uncertainty raises the unknown quantity to a higher power, and places the solution of the problem far beyond the limits of judicial calculation.

I consider the money paid into Court adequate compensation for the land taken, and the only damage shown, viz., to plaintiff's rip-rap.

I was favourably impressed by plaintiff. I think he had more than usual faith in the justice of his cause, and in the future of his business, and I shall penalize him with only one set of costs.

He will, therefore, pay costs as if defendants had appeared by one solicitor, and had been represented at the trial by one senior and one junior counsel.

If the defendants cannot agree on the division of costs so recovered, I shall settle it for them.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 10th September, 1903, before BOYD, C., and FERGUSON, J.

*Watson, K.C.*, and *Grayson Smith*, for the appeal. The lands were not expropriated under either The Railway Act or The Municipal Act. Possession was not taken under any statutory power. The evidence proves, and the trial Judge should have allowed, for injury to the business, which was increasing, and of which the only means of extension was the piece of land taken. A more liberal allowance should have been made for the land: *McLeod v. The Queen* (1889), 2 Ex. C.R. 106; damages to the goodwill should have been allowed: *Re McCauley and City of Toronto* (1889), 18 O.R. 416; also to the prospective capability of the property: *Paint v. The Queen* (1890), 2 Ex. C.R. 149; *Lefebvre v. The Queen* (1884), 1 Ex. C.R. 121; and for the annual loss of profits: *Pouliot v. The Queen* (1887), 1 Ex. C.R. 313. We also refer to *Paradis v. The*

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*Queen* (1887), 1 Ex. C.R. 191; *Wakeman v. The Wheeler and Wilson Manufacturing Co.* (1886), 101 N.Y. 205.

*Clute*, K.C., for the town of Meaford. What was done was by licence and under agreement with the plaintiff and by his express consent, which could not be withdrawn: Cripp's Law of Compensation, 4th ed. 78. The corporation of Meaford were not trespassers, and, if not trespassers they could not be made liable: *West v. Parkdale* (1884), 7 O.R. 270; (1885), 8 O.R. 59; (1885), 12 A.R. 393; (1885), 12 S.C.R. 250; (1887), 12 App. Cas. 602; and even if they were, the plaintiff's only remedy is by arbitration under section 437 of The Municipal Act; *Jones v. The Stanstead Shefford and Chambly Railroad Co.* (1872), L.R. 4 P.C. 98. There is no evidence that the business *as carried on* was damaged or depreciated. I refer also to *Beckett v. The Midland R.W. Co.* (1867), L.R. 3 C.P. 82 at p. 94, approved in *The Chairman, &c., of the Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243; *Caledonian R.W. Co. v. Walker Trustees* (1882), 7 App. Cas. 259; *Rickett v. The Directors, &c., of the Metropolitan R.W. Co.* (1867), L.R. 2 H.L. 175, at p. 191; *Boom Company v. Patterson* (1878), 98 U.S.R. 403; *Ripley v. Great Northern R.W. Co.* (1875), L.R. 10 Ch. 435; *Gibbon v. The Queen* (1900), 6 Ex. C.R. 430; *Laishley v. Goold Bicycle Co.* (1903), 4 O.L.R. 350.

*Shepley*, K.C., for the Grand Trunk Railway Company. The evidence shews the part of the plaintiff's lands remaining is benefited, and that should be taken into consideration, and the trial Judge has so found. The railway company is not liable at all, as the corporation of the town were bound under the statutory agreement (63 Vict. ch. 77 (O.)) to obtain the land for the company. Even if the company were liable, the plaintiff's remedy is by way of arbitration: the Railway Act, 1888, 51 Vict. ch. 29 sec. 144 (D.), and subsequent sections, and arbitration is the only remedy: *Peterborough v. The Grand Trunk R.W. Co.* (1900), 32 O.R. 154, affirmed (1901), 1 O.L.R. 144.

*Watson* in reply.

September 22. BOYD, C.:—It is proved that the provisions of section 121 of the Railway Act, 1888, 51 Vict. ch.



29 (D.), empowering the construction of branch lines by existing railways have been complied with by the deposit of plan, profile and book of reference of the lands intended to be taken in the registry office of the county, and that the same has been approved of by the Railway Committee.

These things being the steps which are conditions precedent to the exercise of compulsory powers by the railway, have all been duly observed: sec. 131; *Parkdale v. West*, 12 App. Cas. 602.

After this, and pursuant to the provisions of the special Act, 63 Vict. ch. 77 (O.), the defendants negotiated with the plaintiff for the acquisition of the land he owned, which was depicted on the plan of the undertaking so approved of and deposited in the registry office, with the result that the agreement of the 3rd October, 1900, was entered into between the plaintiff and the Grand Trunk Railway Company, by which he agreed to sell and convey to the company the piece of land required for the work for \$500—those acting for the defendants were not willing to give more than \$200—and it was then stipulated in the agreement that, “in the meantime” (*i.e.*, till this term of the agreement as to price was settled) the plaintiff consented to the company proceeding with the works on the said lands “without prejudice to the said A. C. Todd.”

The railway people then forthwith entered upon the land and prosecuted their operations, and no agreement has been reached as to the price.

This action is brought to recover compensation for the land and for damages to plaintiff's property, business, etc.

The consent to the company proceeding with work on the land (though “without prejudice”) on the part of the proprietor precludes him from suing as in trespass. The taking possession became a rightful act, and it was not to prejudice the proprietor in getting proper compensation.

But the method of ascertaining compensation is, I think, to be restricted to the statutory proceedings, which preclude a right of action in the ordinary manner.

The company was rightfully in possession under the scheme of The Railway Act, and the agreement made is recognized and provided for by sec. 144. After ten days from

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the deposit of the plans, etc., "application may be made to the owners . . . and, thereupon, agreements and contracts may be made . . . , touching the said lands or the compensation to be paid . . . ; and in case of disagreement between them, . . . all questions which arise . . . shall be settled as hereinafter provided."

The dispute here was the amount of compensation, and that, the Act provides, is to be settled by arbitration.

When the case falls within the purview of the Act by the conditions as to compulsory taking being observed, then various directions are given which are foreign to ordinary litigation, e.g., the value of land is to be ascertained as of the date when the plan was deposited: sec. 145: a set-off as to increased value attaching to the lands remaining, after the severance is to be taken into estimation: sec. 153.

The Act contemplates, as I think, the substitution of the arbitral method by way of expeditious practical relief for that of the usual course of the Courts.

In a case like this of railway possession under the license of the owner, and where the right existed to exercise compulsory powers, it was held in England, that the plaintiff suing in trespass could not succeed, but would have to resort to his special remedy under the Act: *Knapps v. The London, Chatham and Dover R.W. Co.* (1863), 2 H. & C. 212.

The remedy under the Act, if the railway took no further step, is, to have a mandamus requiring them to appoint an arbitrator under section 146, to proceed to fix the amount of compensation.

These conclusions appear to be in accord with the opinion expressed by Sir Montague Smith in *Jones v. The Stanstead, Shefford and Chambly R.W. Co.*, L.R. 4 P.C. 98 at p. 115. He says, "The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful; whilst the claim for compensation, under the Railway Act, supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings but the tribunal to which recourse must be had." And at p. 122, "If, in such cases (where there is an obligation to make compensation), the

company did not, on application, take steps to appoint an arbitrator and proceed to arbitration, the claimant might take proceedings by way of *mandamus* to compel them to give the notice provided by (the Act) or to appoint an arbitrator."

On the merits, I should be disposed to hold that sufficient compensation had not been awarded by the judgment in appeal—as nothing is allowed for the severance of the land, and the price is not so liberal as is usual in compulsory acquisition of land—but it is not open to award more in this action as against the Grand Trunk Railway Company.

The judgment deals with the money paid into Court by Meaford, and declares this to be sufficient compensation.

I think the judgment should direct that amount of money to be paid on account of the plaintiff's claim without prejudice to his prosecuting proceedings for further recovery from the company, if so advised.

There appears to be no cause of action against the town. With the above modification I would dismiss the appeal. It does not appear to be a case for costs as on the amount of compensation, I think the plaintiff is right in seeking more.

FERGUSON, J.:—I concur in the judgment of the Chancellor.

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## [DIVISIONAL COURT.]

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Nov. 12.

## IN RE McDONALD.

*Will—Construction—“Dying without Heirs.”*

A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain legacies and charges, and “in the event of her dying without heirs” then to the testator’s brothers and sisters :—

*Held*, that the ulterior devisees being so related to the first devisee as to be in the course of descent from her the “heirs” of the first devisee must be construed to be “heirs of the body” and therefore that as to the realty the daughter took an estate tail, and as to the personalty an absolute estate.

Judgment of Falconbridge, C.J., K.B., varied.

APPEAL by Jane Burke from the judgment of Falconbridge, C.J.K.B., in an action for the construction of the will of Charles McDonald.

The testator, after directing payment by his executor of all his debts and funeral and testamentary expenses, proceeded as follows :—“ I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say : To my daughter Jane McDonald, all my real and personal property that I die possessed of, after the dissolution of the partnership company, known as L. McDonald & Co., and after a division is made, and after the following bequests, namely : the maintenance of my wife Elizabeth McDonald, now in the Insane Asylum at London, the amount being for that purpose \$20 in advance every three months during her lifetime, and \$500 to be paid Margaret Strath, and to St. Joseph’s Union Homeless Child of New York \$100. In the event of my daughter Jane McDonald predeceasing me, or in the event of her dying without heirs, then I direct that all my property left at that time be equally divided between my brothers and sisters,” naming them. The learned Chief Justice was of opinion that the devisee Jane McDonald, now Jane Burke, took an estate in fee, subject to be divested by an executory devise in default of heirs of the body, referring to *Crawford v. Broddy* (1896), 26 S.C.R. 345 ; *Grant v. Squire* (1901), 2 O.L.R. 131 ; and *Dean v. Dean*, [1891] 3 Ch. 150.



The appeal was argued on the 2nd of November, 1903, before the Divisional Court [STREET, and BRITTON, JJ.]

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*J. H. Moss*, for the appellant. A mixed fund is given absolutely, and the gift over does not take effect because it is limited to what remains after the right to use has been exercised, and is, therefore, repugnant: *Jarman*, 5th ed., p. 333; *Attorney-General v. Hall* (1731), 2 Cox 355; 1 J. & W. 158 (n); *Bland v. Bland* (1745), 2 Cox 349; *Pope v. Pope* (1839), 10 Sim. 1; *Bull v. Kingston* (1816), 1 Mer. 314; *Perry v. Merritt* (1874), L.R. 18 Eq. 152; *In re Percy, Percy v. Percy* (1883), 24 Ch. D. 616. At the least there is an estate tail in the realty, and an absolute estate in the personalty: *Hawkins*, ed. of 1885, p. 188.

*F. W. Harcourt*, for the infant respondents. The words "left at that time" refer to the death of the testator's mother, and there is not, as contended, any power to use the corpus. There is an executory gift over on failure of children: *Metcalfe v. Metcalfe* (1900), 32 O.R. at p. 103; *Crawford v. Broddy*, 26 S.C.R. 345; *Grant v. Squire*, 2 O.L.R. 131.

*J. H. Spence*, and *A. W. Holmsted*, for the adult respondents, referred to *Jarman*, 6th ed., pp. 325, 363, 364, 473; *Bibbens v. Potter* (1879), 10 Ch. D. 733; *In re Thomson's Estate* (1880), 14 Ch. D. 263; *Theobald*, 4th ed., p. 336.

*H. J. Wright*, for the executors.

*Moss*, in reply.

November 12. The judgment of the Court was delivered by STREET, J.:—In my opinion the effect of the devise to Jane McDonald (now Jane Burke) the daughter of the testator, so far as the real estate is concerned, is concisely stated in *Jarman on Wills*, 5th ed., p. 1175, as follows: "Where real estate is devised over in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line, and however remote, as the prior devisee in that case could not die without heirs while the devisee over exists, the word 'heirs' is construed to mean 'heirs of the body;,' and accordingly the estate of the first devisee by the

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effect of the devise over is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate.”

It should, therefore, in my opinion, be declared that Jane Burke took, under her father’s will, an absolute estate tail in possession in the lands devised, subject to the charges set forth in the will, with a vested remainder in fee over to the brothers and sisters of the testator.

It was argued for Jane Burke that the gift over being only of “property left at that time” that is to say, at her death, must fail, because of its uncertainty, and because of its repugnancy to the prior absolute gift to her, upon the authority of the cases cited in Jarman, 5th ed., p. 333.

I do not find, however, that the cases, or the principle upon which they have gone, apply to a case where the previous devise is in tail. A distinction has been established where the first devise is of a limited estate, and the grounds upon which this distinction is founded apply, it seems to me, to cases where the first devise is of an estate tail.

With regard to the personalty, I am of opinion that Jane Burke took it absolutely, subject to the charges set forth in the will. The testator attempted to create an estate tail in it, and the result of such an attempt is to give the absolute interest to the first taker: Jarman, 5th ed., p. 1366; Hawkins (ed. of 1885), p. 188.

The costs of the appeal, of all persons who properly appeared upon it, should come out of the estate.

R. S. C.

## [DIVISIONAL COURT.]

IN RE JELLY, UNION TRUST CO. V. GAMON.

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1903

*Executors and Administrators—Evidence—Corroboration—R.S.O. 1897, ch. 73,  
sec. 10.*

Nov. 12.

Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of and endorsed by the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or in respect of advances.

Judgment of the Master in Ordinary affirmed.

THIS was an appeal by the Union Trust Company, the executors of William Jelly, deceased, from the judgment of the Master in Ordinary in an administration matter allowing the claim of one Tuck as a creditor.

The questions were, whether any part of the claim had been barred by the Statute of Limitations, and whether there was sufficient corroboration to comply with R.S.O. 1897, ch. 73, sec. 10, "The Witnesses and Evidence Act." The learned Master in Ordinary had found in favour of the creditor upon both these points.

The appeal was argued on the 3rd of November, 1903, before the Divisional Court [STREET, and BRITTON, JJ.]

*Bicknell*, K.C., for the appellants. There was no corroboration of the claim, and it should not have been allowed. The claimant's books of account have been given the effect of independent evidence in his favour, which is clearly erroneous. They are not admissible in evidence at all, except, by virtue of Con. Rule 864, in favour of an accounting party, which Tuck is not, but even assuming that they are admissible in evidence they are merely Tuck's written statements, which are not independent corroboration of his oral testimony. The cheques do not carry the matter further. Tuck admittedly was a debtor to the deceased on rent account, and there is nothing in the cheques to shew that they were given in respect of the alleged loans, and not in respect of payments of rent. At any rate

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the Statute of Limitations is a bar to the earlier items of the claim.

*J. H. Moss*, for the claimant. The claim has been made out with the greatest clearness, and there is no possible answer to it except the technical objection as to want of corroboration. That technical objection entirely fails. The books of account and the cheques shew conclusively the correctness of very many of the items, and corroboration as to all the items is not essential. Anything that tends to shew that the claimant is telling the truth is sufficient: *Green v. McLeod* (1896), 23 A.R. 676; *Wilson v. Howe* (1903), 5 O.L.R. 323. There was a running account between the claimant and the deceased, with payments from time to time, and the Statute of Limitations does not apply: Banning, 3rd ed., p. 220.

*Bicknell*, in rep'y.

NOVEMBER 12. The judgment of the Court was delivered by STREET, J.:—The creditor, Tuck, had been tenant to the testator, William Jelly, of the Royal Hotel in Shelburne, under an oral agreement at \$650 a year, from February 1886, until May, 1901. During that period he had a running account with his landlord, making payments from time to time on account of his rent, and advancing money from time to time on account of rent to his landlord, and on various other dealings between them, including the purchase by Tuck from Jelly, at the beginning of his tenancy, of the stock on hand of liquors and groceries, and of the furniture in the hotel. Tuck kept a cash book and ledger in which the cash transactions between him and Jelly were entered by him from day to day: all the ledger cash transactions were evidenced by cheques given by Tuck to Jelly, entered regularly in the cash book and produced in evidence. The terms of his tenancy, including a special arrangement as to taxes, were also duly entered in his book. This arrangement was that Tuck was to pay the taxes in addition to his rent, but that if the taxes should exceed \$86 per annum, the landlord should repay or allow the surplus. A considerable amount made up of small sums alleged to have been paid in cash by Tuck to Jelly, from time to time, and entered in Tuck's books, but not otherwise vouched, was disputed by the



executors, but allowed by the Master in Ordinary. A charge of \$254 for a dinner to 127 persons, given by the testator as Warden of the county, at Tuck's hotel, and entered in Tuck's books, was also proved by other evidence. It was shewn that the testator was a man of considerable means, but that he was constantly in need of ready money, being "land poor," as it was expressed: and it further appeared that he kept no books of account, or memoranda of his transactions with Tuck. No settlement of accounts between Tuck and the testator had ever been made.

In my opinion, the learned Master in Ordinary, giving credit, as he clearly did, to the evidence of Tuck in support of his own claim, was justified in holding that the claim was sufficiently corroborated by some other material evidence. It was impossible to exclude from consideration the books of account kept by Tuck, because he was entitled to refer to them to refresh his memory as to the items of his account. The entries in his books were sworn to by him as being correct, and they were vouched in perhaps 100 entries by the production of cheques, payable to the testator's order, and endorsed by him, and in other cases by other oral testimony. The general correctness of the books was shewn, therefore, by other material evidence, and the oath of the creditor was, in my opinion; sufficiently corroborated to entitle the Master to act upon it: *Green v. McLeod*, 23 A.R. 676.

The account between Tuck and the testator was a running account, with frequent entries each month from its beginning to its end, and, therefore, the Statute of Limitations cannot apply to any of the items: *Banning on Limitations*, 3rd ed., p. 220.

The appeal should, therefore, be dismissed with costs.

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## [DIVISIONAL COURT.]

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Nov. 21.

DUNN V. MALONE.

*Interest—Contract—Chattel Mortgage—Statement of Rate—Interest Act, 1897—60, 61 Vict. Ch. 8 (D)—Statutes—Waiver.*

A chattel mortgage provided for the payment of \$125, the principal money, in consecutive monthly instalments of \$5 each, and for payment of \$5 more with each instalment for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897 :—

*Held*, that this being an Act passed on grounds of public policy for the benefit of borrowers its application could not be waived and that the mortgagee was entitled to interest only at the legal rate.

Judgment of Snider, Co. J., affirmed.

APPEAL by the defendant from the judgment at the trial.

On the 6th of April, 1901, the plaintiffs made a chattel mortgage to one Samuel Bell, of the city of Hamilton, of their household chattels and effects to secure payment of \$125 advanced to them by him. The terms of the mortgage provided that it should be void on payment by the mortgagors of “\$125 and interest on the same at the rate of \$5 per month,” as follows: “The said principal sum of \$125 to become due and payable as follows: in equal monthly instalments of \$5 each, payable on the sixth day of each month from the date of this mortgage until the whole of the said principal sum is fully paid and satisfied. Interest at the rate of \$5 per month both before and after maturity, and until the said principal sum of \$125 is fully paid and satisfied, to be paid on the sixth day of each and every month after the date of this chattel mortgage, and until the said principal sum of \$125 is fully paid and satisfied, such interest at the rate of \$5 per month to be so payable monthly without any deduction or abatement whatsoever until the said principal sum of \$125 is fully paid and satisfied. . . . The rate of interest secured by this chattel mortgage is at the rate of \$5 per month, payable until the said sum of \$125 is fully paid and satisfied. This proviso it is agreed between the parties hereto fully sets forth the rate of interest due under this mortgage as required and provided for in chapter 8 of the statutes of Canada for the year 1897, entitled

'The Interest Act of 1897,' and the Act amending the same passed by the Dominion of Canada in the year 1900." By another clause in the mortgage it was provided as follows: "The mortgagors hereby waive the benefit (if any) of chapter 8 of the statutes of Canada for the year 1897, entitled 'The Interest Act of 1897,' and chapter 29 of the statutes of Canada for the year 1900, entitled 'An Act to amend the Acts respecting Interest,' and hereby agree that said Acts shall not apply to this chattel mortgage or to the interest thereby secured or to the loan thereby effected. . . ." The mortgagee is hereby declared entitled to plead the above "waiver as a bar to any action that may be brought against him by the mortgagors or in connection with the moneys advanced on these presents, or the interest thereon, or the loan thereby effected."

The plaintiffs made twelve monthly payments of \$5 each, and two payments of \$10 each—in all, \$80—on account of interest, between the 6th of April, 1901, when the advance was made, and the 6th of August, 1902, when the last of these payments was made; they also made nine monthly payments of \$5 each on account of principal, the first of them on the 6th of June, 1901, and the last on the 6th of June, 1902. On the 29th of December, 1902, they tendered to the mortgagee \$30 as being enough to satisfy the balance of the mortgage money: this tender was refused, the mortgagee claiming \$80 for principal and \$20 for interest. On the 31st of December, 1902, Bell assigned the chattel mortgage to Jennie Malone, of Hamilton, a married woman, and a renewal of the chattel mortgage was filed, claiming as still due the following sum:—

1901—April 6.	To cash advanced	-	\$125.00
1903—March 6.	To 23 months' interest		
	at \$5	- - - - -	115.00
1903—March 6.	To costs of renewal	-	3.75
			<hr/>
			\$243.75
Paid on interest	- - -	\$80.00	
Paid on principal	- - -	45.00	
		<hr/>	125.00
			<hr/>
Balance due 6th March, 1903	-		\$118.75

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On the 10th of January, 1903, the plaintiffs brought the present action in the county court of Wentworth to redeem, and offered to pay the \$30 which they had tendered. The action was tried before the Judge of the county court of Wentworth, who gave judgment declaring that the defendant was entitled to no more than the \$30 which had been tendered, and ordered the defendant to pay the plaintiffs' costs, the \$30 to be set off against them.

The appeal was argued on the 4th of November, 1903 before the Divisional Court [STREET, and BRITTON, JJ.]

*W. S. McBrayne*, and *Martin Malone*, for the appellant. There is in the mortgage an explicit waiver of the application of the Dominion Interest Act, and the mortgagors cannot now contend that the terms of that Act have not been complied with. The Act has not been passed in order to prevent usurious transactions, but with the view of compelling a contract to be in such terms as to be readily understood by the borrower. It is perfectly plain on the evidence in this case that the borrower understood exactly what interest he was to pay, and the mortgage was signed by himself and his wife after full explanation. Instead of being a protection to the borrower in this case, it would really have been more likely to puzzle him had there been an elaborate calculation shewing what the yearly rate of interest upon each payment of principal amounted to. The benefit of an Act of Parliament can be waived: Broom's Legal Maxims, 7th ed., p. 536; Harcastle, 3rd ed., pp. 84, 270; 28 Am. & Eng. Encyc. of Law, 1st ed., p. 533, tit. "Waiver." The only exceptions are where public interests or the jurisdiction of the courts are or is involved: *Graham v. Ingleby* (1848), 1 Exch. 651, at p. 657; *Rumsey v. North-Eastern R. W. Co.* (1863), 14 C. B. N. S. 640; *Wilson v. McIntosh*, [1894] A.C. 129. The interests of the public are not intended to be protected by the Act now in question. The benefit of the Limitations Act, the Landlord and Tenant Act, and the Bills of Exchange Act, is continually being waived without any objection, and there is no reason why the benefit of this Act should not be similarly waived: *Hammond v. Hocking* (1884), 12 Q. B. D. 291. As an example of the kind



of case where there cannot be waiver, *Sherrard v. Gascoigne*, [1900] 2 Q. B. 279, may be referred to. There is no pretence that there has been any over-reaching or mistake, and the doctrine of such cases as *Linfoot v. Pockett*, [1895] 2 Ch. 835, does not apply. The Act apparently is intended to deal only with cases where the time of payment is less than a year.

*D'Arcy Martin*, for the respondents. Clearly there is nothing in the last point referred to on behalf of the appellant. The Act relates to all contracts irrespective of the time of payment. The intention of the statute evidently is to protect borrowers by insisting that their attention shall be called to the rate of interest which they have to pay. It is true that the borrower in this case understood that he was to pay \$5 a month for interest, but it is quite evident that he could not have understood that in making such a payment he was really paying interest, on the last instalment for instance, at the rate of 1,200 per cent. per annum. Undoubtedly if such a rate of interest had been mentioned in the mortgage, the borrower would have objected. Questions of the rate of interest and the application of usury laws have always been regarded as matters of public policy, and the benefit of an Act of this kind cannot be waived: *Manufacturers' Life Ins. Co. v. Anctil* (1897), 28 S.C.R. 103. Laws of this kind are for the protection, and safeguarding of the interest of, necessitous borrowers, and strict compliance with their provisions is essential: *Bosler v. Rheem* (1872), 72 Pa. St. 54; *Maybee v. Crozier* (1880), 22 Hun 264. The doctrine of estoppel does not apply as against the express provisions of an Act of Parliament: *Everest and Strode*, p. 199; *Barrow's Case* (1880), 14 Ch. D. 432, at p. 441. The bargain was an unconscionable and unjust one, entered into without independent advice or protection, and should not be enforced: *Fry v. Lane* (1889), 40 Ch. D. 321.

*McBrayne*, in reply.

Novembér 21. The judgment of the Court was delivered by STREET, J.:—The Interest Act, 1897, provides (section 2) that "Whenever any interest is, by the terms of any written or printed contract and whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or

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percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent. per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent."

(Section 3): "If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may be recovered back or deducted from any principal or interest payable under such contract."

(Section 4): "This Act shall not apply to mortgages on real estate."

The defendant relies upon the clauses in the chattel mortgage in question, by which the plaintiffs are made to declare that the statement in the mortgage of the rate of interest is a compliance with the Act, and to waive, and agree not to plead, the terms of the statute.

In my opinion this defence cannot be allowed to prevail. The Act of 1897 was passed in the public interest for the protection of persons borrowing money upon personal security of any nature. Such persons, as is well known, are frequently necessitous, and are willing to pay high rates for money. The policy of the law as it now stands is to allow the borrower and the lender to agree upon any rate of interest, and the borrower having agreed to it must pay it, provided the rate per annum is stated in the contract. This proviso is his only protection, and it is introduced to prevent his being kept in the dark by the lender as to the real rate of interest per annum which he is agreeing to pay. It is a part of the general public law, and is intended to prevent imposition being practised by lenders upon borrowers in certain cases.

Such being its character and objects, to allow a borrower to agree, when making his contract, to contract that the Act should not apply, would be to deprive him of the protection provided for him by the Act. If these clauses of waiver were held to be valid, they would become a common form, and the Act would speedily become a dead letter.

There is a somewhat singular lack of authority upon the point in the English and Canadian reports, so far as I have

been able to ascertain, but the American cases of *Maybee v. Crozier*, 22 Hun 264; and *Bosler v. Rheem*, 72 Pa. St. 54, are much in point, and the reasoning upon which they are founded seems entirely satisfactory. See also cases referred to in 28 Am. & Eng. Ency. of Law, 1st ed., pp. 533-4, title "Waiver;" and *Graham v. Ingleby*, 1 Exch. 651.

In my opinion, therefore, the appeal should be dismissed with costs.

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[BOYD, C.]

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Feb. 20.

## THE ATTORNEY-GENERAL FOR ONTARIO.

*Land Titles Act, R.S.O. 1897, ch. 138—Transfer by Owner—Fraud—Forged Conveyance from Transferee—Subsequent Purchaser for Value without Notice—Assurance Fund—Claim on.*

Plaintiff being the owner of land registered under the Land Titles Act R.S.O. 1897, ch. 138 was by the fraud of two persons G. and H. induced to transfer her land to one D. Subsequently a transfer to Mc.D. purporting to be signed by D. was registered but D.'s signature was forged. Mc.D. then transferred to O'M. and O'M. to B. both being parties to the fraud with G. and H. B. then transferred to C. an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible an action was brought by the plaintiff for compensation for the loss of the land out of the Assurance Fund under sections 130 and 132 of the Act:—  
*Held*, that the plaintiff had not been "wrongfully deprived" under sec. 132 and that she could not recover.

THIS was an action brought by Drusilla Fawkes against the Attorney-General for the Province of Ontario, claiming compensation out of the Assurance Fund, under secs. 130 and 132 of the Land Titles Act, R.S.O. 1897. ch. 138.

The action was tried at Toronto, on 16th of February, 1903, before BOYD, C., without a jury. The facts are stated in the judgment.

*N. W. Rowell*, K.C., and *S. C. Wood*, Jr., for the plaintiff.

*R. C. Clute*, K.C., and *McGregor Young*, for the defendant.

February 20. BOYD, C.:—This is a case of first impression, arising on the application of the plaintiff to be paid compensation, or damages, out of the Assurance Fund provided by the Land Titles Act, R.S.O. ch 138, secs. 130 and 132.

The claim is made upon the following record of title and admitted facts:—

Prior to 1893 the land having been already brought under the provisions of the said Act, the plaintiff did, in April, 1893, transfer the land to one Deacon, or Dakin, for value represented by certain stocks, which transfer was duly registered.



In May there was duly registered a transfer, purporting to be made by the said Deacon to one William McDonald; this transfer was not signed by Deacon, his signature being a forgery.

Later, in May, there was registered a transfer purporting to be signed by the said McDonald to one James O'Mulvena, and at the end of May the said O'Mulvena made a transfer to Catharine E. Brisley, which was registered, and in September the said Brisley made a transfer for value in other land to Levi J. Clark, which was duly registered.

It appears now that the stock taken by the plaintiff was of no value, and that the transaction was altogether such a fraud as would be set aside by the Court as against Deacon, and the string of transferees down to Clark, but as to Clark, his position is impregnable, being a registered purchaser for value without notice.

There is little doubt that the real wrongdoers throughout are two persons who have been convicted of this fraud and are now inmates of the penitentiary. These men, Griffin and Hawkesworth were the chief actors who deceived the plaintiff, put forward Deacon, forged his name, put forward McDonald, whose real name was McConnell, as a transferee (he is now dead) and also put forward their clerk, Mulvey, after Italianizing his name, and the person called Brisley, who was the wife of Griffin, as ostensible transferees, and who negotiated the exchange of properties with Clark, the one *bonâ fide* person in the web of deception, who acted honestly, and is protected by the provisions of the Land Titles Act.

It is admitted, or proved sufficiently, that all these deceivers, who lent themselves to the machinations of Griffin and Hawkesworth, are persons of no substance; all, including the chief malefactors, are financially worthless, and from none of them could any money be recovered by the plaintiff, and the land is beyond her reach in the hands of Clark.

In these circumstances the plaintiff asks that compensation for her loss may be ordered out of the fund, and Mr. Rowell, for plaintiff, argues that her case is in terms within the scope the Act, because she has been "deprived of her land by reason of of some one else being registered as owner."

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The meaning and compass of the Act has to be considered. The purpose of the assurance fund is declared by sec. 130. It is for the indemnity of persons who may happen to be deprived of land.

- (a) By reason of the land being brought under the provisions of the Act; or,
- (b) By the registration of some other person as owner; or,
- (c) By reason of any misdescription, omission or other error in a certificate of title or in any entry in the register.

Then the persons to be indemnified are those mentioned in section 132 who, having a right to recover compensation from the person, on whose application the erroneous registration was made, or who acquired title through the fraud or error, are unable to do so, and can then fall back upon the fund.

Section 132 is not happily expressed. It, however, distinctly adds an element to section 130; that, namely, of fraud, or wrongdoing. It is thus expressed: Any person *wrongfully* deprived of land—

- (a) By reason of the land being brought under this Act; or,
- (b) By reason of some other person being registered as owner; or,
- (c) By reason of any misdescription, or other error, in any certificate of title, or in any entry in the register,

shall be entitled to recover what is just, by way of compensation, or damages, from (1) the person on whose application the erroneous registration was made, or (2) who acquired the title through the fraud or error.

These words “through the fraud,” have no obvious relation to anything that precedes, unless it be that “wrongfully” (that is by wrongful means) is to be taken as “the fraud” intended.

Sub-sec. (2) of sec. 132 refers to a person registered as owner “through the fraud or error whether the fraud or error consists in a wrong description . . . or otherwise, howsoever.”

Yet the result remains that not “fraud” generally is comprehended in these words: not all such personal equities as may result from fraudulent dealings, but any fraud which would lead to wrongful deprivation of the land, as regards the right owner in the particular matters specified.

The governing words appear to be *wrongful deprivation*. And these do not apply to the present transaction. When can it be said that the plaintiff suffered wrongful deprivation. Not when she made the transfer to Deacon, for that was a real transaction, and the intention was to transfer the estate and property in the land. True, that transaction was voidable when the plaintiff discovered the imposition practised upon her, but at the time of that discovery the rights of the *bonâ fide* transferee had intervened. Clark being registered as owner did not *deprive* the plaintiff of the land: it may have prevented her recovering the land; she had ceased to be owner under the Act when her transfer was registered to Deacon, and the land was transferred in due course to Clark.

The peculiarity in this case which gives some point to the plaintiff's contention is, that it happens that one link in the chain is a forgery—that is the transfer from Deacon.

Under the Registry Act, 1897, R.S.O. ch. 136, this forged deed would form an incurable defect, and the status of Clark as *bonâ fide* purchaser for value would not avail him, because it would rest upon this void instrument which would not carry the title out of the plaintiff's reach: *In Re Cooper*, *Cooper v. Vesey* (1881), 20 Ch. D. 611; but under the Land Titles Act this otherwise fatal defect would seem to be cured in the hands of an honest holder for value: *Gibbs v. Messer, McIntyres & Cresswell*, [1891] A.C. 248. Hence argues the plaintiff, being under the Land Titles Act, I am deprived of my land, which I would not have been, had the title been one of ordinary registration.

It seems to me this forgery is a mere accident, a collateral matter as far as the legal rights of the plaintiff are concerned. Had there been no forgery Clark's claim would have been paramount to her's under either Act: the Registry Act, or the Land Titles Act.

The plaintiff has no claim on the ground of the land being brought under the Act, for these words refer to the *initial* proceeding by which the particular land is brought under the provisions of the Act. Neither is there any claim under the provisions, as to error in the certificate, or entry in the record.

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There remains but the claim that she has been wrongfully deprived by reason of some other person being registered as owner.

Now, I think the word *deprivation* is used in contradistinction to another word in the Act "*disposition*." The plaintiff's dealing with the land falls under sec. 124: she made a transfer, which was a *disposition* of the land, that if properly attacked, would be declared fraudulent and void. Her act was a *disposition* of the land, a voluntary thing, and it is not to be called a *deprivation* of it.

According to the Oxford English Dictionary "To deprive a person of a thing, is to take it away from him." *Sub voce*. It imports wrongful action, or action *in invitum*, and in the statute, I think, it intends some transaction *ex parte*, or behind the back of the true owner, or wherein his existence is concealed, whereby he being in ignorance of what is going on, is deprived of his property. As contrasting "*disposition*" and "*deprivation*" refer to *Attorney-General v. Montefiore* (1888), 21 Q.B.D. 461, and *The Attorney-General v. Mayor of Sibthorp* (1858), 3 H. & N. 424, at p. 453. In such a case the provisions of the Act have been employed to do wrong against the real owner, and if he suffers the loss of the land thereby, yet shall amends be made to him out of the fund, if the personal remedy is fruitless.

The action is dismissed; costs of the Attorney-General out of the fund.

G. A. B.

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## [IN THE COURT OF APPEAL.]

STEWART V. WALKER.

C. A.

1903

Nov. 16.

*Will—Probate—Lost Will—Evidence—Solicitor—Privilege—Declarations.*

The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence.

Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn and was claiming large benefits under the will in question, which, it was alleged, had been lost or stolen.

The facts that the testator was aware that unless he made a will his property would go to the Crown; that he was an experienced man of business, possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days duration, he had expressed no wish to make a will, were held sufficient to rebut the presumption of destruction of the will by the testator.

Judgment of MacMahon, J., affirmed.

APPEAL by the Attorney-General for Ontario from the judgment at the trial.

The action was brought to establish as the will of one John Alexander McLaren, who died on the 11th of December, 1901, a will said to have been executed by him on the 25th of June, 1897. This alleged will had been drawn by the plaintiff, and he produced a copy of it made by him at the time. By this will the greater part of the estate, which was of large value, was left to the plaintiff and he was appointed sole executor. After the death of the testator, who was illegitimate and had never married, the will could not be found, and the Attorney-General, on behalf of the Province, contended that there had been an intestacy. The action was thereupon brought, the legatees named in the will being joined with the Attorney-General as co-defendants.

The action was tried at Perth on the 19th of May, 1902, and four following days, before MacMahon, J., who on the 10th of July, 1902, gave judgment in favour of the plaintiff.

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The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, and GARROW, JJ.A., on the 7th, 8th, 11th, 12th, and 13th of May, 1903.

*Aylesworth*, K.C., and *Shepley*, K.C., for the appellant.

*Watson*, K.C., and *J. Grayson Smith*, for the plaintiff.

*S. H. Blake*, K.C., *Riddell*, K.C., and *J. Lorn McDougall*, for the legatees.

Upon the argument the evidence was discussed at great length, and there was very little divergence of opinion as to the general principles of law applicable, though questions arose as to the rejection and admission of evidence. At the trial the evidence of Mr. F. A. Hall, who had been the deceased's solicitor, of statements made by the deceased to him in reference to the will, was rejected, and the counsel for the appellant contended that it should have been received. It was also contended that statements made by the deceased to other persons should have been rejected, and that on the whole case there was no evidence to corroborate that of the plaintiff or to rebut the presumption of revocation of the will. The following authorities were those particularly discussed and relied on: *Welch v. Phillips* (1836), 1 Moo. P.C. 299; *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154; *Keen v. Keen* (1873), L. R. 3 P. & D. 105; *Allan v. Morrison*, [1900] A. C. 604; *Woodward v. Goulstone* (1886), 11 App. Cas. 469; *Atkinson v. Morris*, [1897] P. 40; *Finch v. Finch* (1867), L. R. 1 P. & D. 371; *Hogg v. Maguire* (1885), 11 A.R. 507; *Davis v. Davis* (1824), 2 Addams 223; *Saunders v. Saunders* (1848), 6 Notes of Cases 518; *Whiteley v. King* (1864), 17 C.B. N.S. 756; *Bessey v. Bostwick* (1867), 13 Gr. 279.

On the 14th of September, 1903, the Court intimated that they would hear the evidence of Mr. Hall. This evidence was subsequently given and the case stood over for judgment.

November 16. MOSS, C.J.O.:—This is an action brought by John A. Stewart of the town of Perth, barrister-at-law, to establish as the last will and testament of John Alexander McLaren of the town of Perth, distiller, who died on the 11th

of December, 1901, a testamentary paper executed by him on the 25th of June, 1897, as and for his last will and testament. The paper is not produced and cannot now be found, but there is produced a paper purporting to be a copy, and sworn by the plaintiff to have been made by him on the day of the execution of the original. It appeared by this paper that the deceased, after making several devises and bequests, gave the residue of his estate to the plaintiff, and made him sole executor. The deceased was illegitimate, and was never married, consequently the Attorney-General of the Province is a party defendant to the action, as representing the Crown, upon whom the estate would devolve by escheat in the event of intestacy. The other defendants are the persons named in the paper as legatees and beneficiaries.

The action was tried by MacMahon, J., who pronounced in favour of the will. The Attorney-General appealed from the judgment, and the case was argued during the May sittings of the Court.

One objection taken on behalf of the appellant was to the rejection of the evidence of Mr. Francis A. Hall, solicitor, with regard to certain communications said to have passed between him and the deceased during the existence between them of the relationship of solicitor and client, and which those opposed in interest to the Attorney-General claimed the right to exclude on the ground that they were privileged. The privilege is not the privilege of the solicitor, but of the client who may waive it or not as he pleases. In this case the client by whom the communications were made was dead, leaving no heirs or next of kin to stand in his place. No person survived him upon whom the benefit of the privilege devolved, unless it was the Attorney-General, who, in the event of intestacy, would be entitled to obtain letters of administration to the estate: R.S.O. 1897, ch. 70. The plaintiff claims the benefit of the privilege as executor of the will, but the existence or non-existence of the will is the question at issue.

The mere fact of the death did not destroy the privilege, but the right of the Attorney-General to waive the benefit was at least equal to that of the plaintiff. The nature of the case precludes the question of privilege from arising. The reason

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on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him when they are in conflict with the claims of third persons not claiming, or assuming to claim, under him. And that is not this case, where the question is as to what testamentary dispositions, if any, were made by the client. As said by Sir George Turner, Vice-Chancellor, in *Russell v. Jackson* (1851), 9 Ha. 387, at p. 392: "The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor . . . and the disclosure when made can expose the Court to no greater difficulty than presents itself in all cases where the Courts have to ascertain the views and intentions of parties, or the objects and purposes for which dispositions have been made." It has been the constant practice to apply the rule here stated in cases of contested wills where the evidence of the solicitors by whom the wills were prepared, as to the instructions they received, is always received. And the application of a different rule in this action would deprive the plaintiff of a considerable part of the proof of his case. On these grounds we held that the evidence should have been received, and, acting under Con. Rule 498, directed it to be given orally before the Court.

Mr. Hall appeared and testified before the Court on the 2nd of October, and the case is now to be dealt with upon all the evidence before the Court.

The testimony establishes, and it is not now disputed, that on the 25th of June, 1897, the deceased executed, with all the formalities prescribed by the statute, a paper prepared by the plaintiff, by the direction of the deceased, purporting to be his last will and testament. We commence, therefore, with that fact well proven. The paper not being produced, the questions are: (1) have its contents been proved and established with sufficient certainty; and (2) was it revoked or destroyed by the testator *animo revocandi* or *animo cancellandi*, or is it to be deemed as still in existence as a valid subsisting will, lost, mislaid or destroyed by accident or otherwise, without intention on the part of the testator to put an end to it as a testamentary paper?



It may not be possible entirely to separate these questions, but it is convenient to consider them in the order indicated.

Beyond question, the will was drawn by the plaintiff from instructions given to him by the deceased. The plaintiff so deposes and the circumstances support his statement. The plaintiff was at that time the deceased's general solicitor and legal adviser, and it was not unnatural that if he was minded to make a will he would instruct the plaintiff to prepare it for him. It was shewn that he was at the plaintiff's office on the morning of the day on which the will was executed, and that he returned in the afternoon and then executed the will in the presence of the plaintiff and the two attesting witnesses, Peter McGregor, who was a witness at the trial, and Archibald Elliott, who had died some time before the trial. The will was not read over in the hearing of the witnesses, and McGregor was unable to say what was done with it after it was executed. The plaintiff deposes that on one occasion, in 1895, and on two occasions in 1896, the deceased spoke of making a will, but did not enter into details, except to say that he was troubled as to what provision he should make for Mrs. McIntyre. There was no further discussion about the disposition he intended to make until the morning of the 25th of June, 1897. He then came into the office and told the plaintiff that he had made up his mind as to what disposition he wanted to make of his property, and wanted to get it done—that he had it all blocked out and wanted to get it done. He then gave the plaintiff instructions which he noted on two sheets of note paper. He mentioned the provisions he desired to be made for his mother's children and others, ending with a legacy of \$5000 to Miss Hamilton. The plaintiff asked, "Who next?" to which he replied, "That is all." Plaintiff then asked, "What about the residue?" He said, "The rest is for you; you take the residue." The plaintiff then said, "Don't you think you are giving me a good deal?" His reply was that he was the best judge of that himself, that he had always been fonder of the plaintiff than of any other of his relatives; that he was the only one that he had been able to come to and talk to and discuss private affairs; that the plaintiff would not find it any more than was necessary to carry on the business, and that he did not want to see it closed up. The

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plaintiff then expressed his gratitude and noted, "J. A. S. residue." Then they discussed the manner in which the provision made for Mrs. McIntyre, and the legacies, should be charged upon the estate, and the appointment of executors. The plaintiff suggested Mr. Chas. Meehan, but the deceased thought there was no occasion for any executor but the plaintiff. There was then some discussion about the custody of the will after it was executed, and the deceased said he would keep it himself. He then went away, and the plaintiff immediately prepared the will, following the notes he had made. He also made a copy, intending to keep it. In the afternoon the deceased returned. The plaintiff handed him the will he had drawn, and he read it over carefully, and in reply to a question by plaintiff whether it was all right, said yes. The witnesses were then brought into the plaintiff's room, and the deceased executed the will. After the witnesses left the plaintiff's room he placed the will in an envelope and handed it to the deceased, who took it away with him. This was the last the plaintiff saw of it. He did not shew the deceased the copy he had made, nor tell him of it, but immediately after he went away he filled in the date and the names of the witnesses and put it in an envelope, together with his own will, and placed it with his private papers in the safe. In June, 1898, he took the copy of deceased's will out of the safe and tied it up in an unbound volume of law reports and left it there until after the deceased's death. No person but the plaintiff ever saw this copy during the deceased's lifetime.

It is not contended that if the will was now produced and proved to be the same as the paper produced by the plaintiff, it would be invalid by reason of its having been drawn by the plaintiff and executed under the circumstances deposed to. But it was strongly urged that in view of the relationship and the large interest which the plaintiff takes under the will if established, and of the fact that the plaintiff is the sole witness who testifies to the contents of the will, there is not sufficient proof of the contents to satisfy the onus and to justify the Court in declaring that the will executed was in the words set forth in the paper produced; that the proof rests solely on the plaintiff's uncorroborated testimony, and failing that there is no proof upon which to base a judgment.

The learned trial Judge appears to have accepted the plaintiff as a truthful witness, and certainly there is nothing in his evidence as reported that ought to lead to a contrary conclusion. In an ordinary case of a contest between two living persons with regard to the contents of a lost deed to which they were parties, the testimony of one who produced and swore to the truth of a copy would, if credited, be sufficient to prove the contents without corroboration. If in a case like the present there is a different rule it is only by reason of the circumstance that it is the contents of a will that are sought to be established, and that the maker of it is deceased. Undoubtedly, the Court should be more careful in accepting and acting upon the evidence, but if it is completely satisfied with the general truthfulness and veracity of the witness; that his testimony is consistent with the circumstances, and that in general his memory is accurate, the extent of corroboration required may safely be measured by these considerations.

In *Sugden v. Lord St. Leonards*, 1 P.D. 154, which was so much discussed in argument, the difficulty which oppressed the Judges was, that Miss Sugden was speaking of her recollection of documents not produced, technical in form and language, of a nature with which most young ladies would be utterly unacquainted, and that while there was no doubt of her veracity and honesty of purpose, the accuracy of her memory and recollection of the terms of the testamentary papers of which she was speaking might well be questioned. The question was not what reliance was to be placed on Miss Sugden's veracity, but to what extent it was safe to accept and act upon her memory and recollection of the documents she spoke of. And it was in that view that corroboration was so anxiously sought for in the writings left by the testator and the declarations made by him before and after the execution of the wills. If she had been able to produce copies, or even drafts of the documents, can it be doubted that her evidence would have been accepted without question, and almost without further enquiry?

In the case at bar, if the plaintiff's evidence is to be credited, there is no difficulty as to the exact terms of the will.

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But the plaintiff's evidence is not without corroboration in the circumstances preceding and surrounding the making of the will, and in the deceased's acts and declarations as deposed to by other witnesses. That the deceased intended to make a will is shewn by the fact that he did execute a testamentary paper. That he intended to dispose of all his property is more than probable. He was aware that if he died without a will his estate would go to the Crown, and it is clear that he had no desire to bring about such an eventuality—he was even averse to any part going in payment of succession duties.

In making a disposition of his property, who were the persons most likely to be considered by him as the objects of his bounty? It is shewn that he had always regarded his mother's children—his brothers and sisters of the half-blood, though not so in a legal sense—with affection and treated them with kindness. During his mother's lifetime he had paid a number of visits to the farm on which she lived with some of the members of her family. He had become possessed of the farm, and after her death he allowed her son Hugh to continue on it—apparently without payment of rent. He had also advanced him some money.

He was on affectionate terms with Mrs. Stewart, the plaintiff's mother, and remained so notwithstanding a bitter quarrel with her husband. Mrs. McIntyre paid him frequent visits and remained in his house at Perth for long periods of time. Another sister, Jennie, who had married a person of the name of Stewart, died at Cleveland, leaving three children, whom he had living with him for some time after their mother's death.

Of his nephew, Angus McNabb, he always spoke favourably. These, with the plaintiff, may be said to be the relatives of whom he might naturally think in connection with his property, and the evidence discloses no other persons who from ties of relationship may be said to have had any claims upon him.

It was shewn that for the plaintiff he always entertained the strongest regard. He was his namesake, and as he grew up and developed ability and business capacity he was proud of his success and advance in life. These feelings increased and strengthened when the relationship of solicitor and adviser was established. He regarded the plaintiff's brother in an altogether



different aspect. For reasons, whether good or bad, but satisfactory to himself, he held an unfavourable opinion of him. So that in the year 1897 there was no one of his connections so high in his estimation as the plaintiff, or one whom he was so likely to regard as the person best qualified and entitled to carry on the business which he was desirous of perpetuating, and most worthy to become the recipient of the largest part of his estate.

There were two other persons whom the circumstances point to as persons whom he was altogether likely to regard as proper objects of bounty. Frank Walker had been the manager of his liquor store for a number of years, and was a trusted employee. A considerable sum representing salary or wages was held in the deceased's hands. They were on terms of friendship and mutual confidence, and it would be surprising if the deceased had overlooked Walker in considering the disposition of his estate. Miss Hamilton's relations towards the deceased and his well known generosity towards her and her family, rendered it more than probable that she would not be forgotten. The terms of the will, as set out in the paper produced, appear reasonable and in accord with the probabilities. There is further support from acts and expressions of the deceased subsequent to the making of the will. It has been urged that these should not be received as evidence on this branch of the case. It is argued that, although they may be regarded as throwing light on the question of intention to adhere to the will, and as therefore rebutting the presumption arising from non-production, they should not be looked at as evidence in proof of the contents. But while the decision in *Sugden v. Lord St. Leonards*, 1 P. D. 154, stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents. Reference was made to the observations of the Law Lords in *Woodward v. Goulstone*, 11 App. Cas. 469; and of the Court of Appeal in *Atkinson v. Morris*, [1897] P. 40. But the Law Lords in the first place expressly disclaimed any intention of dissenting from the judgment of the majority of the Court in *Sugden v. Lord St. Leonards*; and Lord Blackburn said that their decision would not make the case better or worse as an

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authority than it was before. And in the second case, although references were made to the case, it was not with a view to questioning it, but in order to point out that it had no bearing on the question in hand, which was an entirely different one. And Lord Russell of Killowen, C.J., said that if it were necessary for the Court to consider the point which was dealt with in *Sugden v. Lord St. Leonards* they would be bound by the decision upon it.

And it is still an authority to be followed in similar cases. The declarations are receivable for what they may be worth, and it is for the Court to judge of the weight to be attached to them. Several statements, more or less definite, made by the deceased, are in evidence. The conversation with Mrs. Stewart in February or March, 1901, is important because it arose in consequence of the deceased's determination to make a deed to Hugh Cameron of the farms which are mentioned in the copy of the will as devised to him. At the request of the deceased, Mrs. Stewart conducted some correspondence with Hugh Cameron in regard to the matter, and in course of conversation with her concerning it, he said to her that it made no difference whether Hugh had the deed or he (deceased) had the deed, the farm was intended for Hugh. Before the deed was made, and with reference to the same transaction, he prepared a statement shewing the sums owing to him by Hugh Cameron, and a calculation of interest thereon.

In the year 1901 he had two conversations with Frank Walker. They were discussing the latter's position with regard to his unpaid salary or wages. The deceased on each occasion used nearly the same expression. He said to Walker that he was provided for. In August, 1901, he used nearly the same expression to Miss Hamilton in the course of a discussion in which she spoke of going away to become a trained nurse. He told her that she was provided for.

It is wholly unlikely that the deceased was deliberately speaking falsely, or intending to create a false impression by those statements, and if they were spoken they certainly had reference to a provision already made, and in the instances in which he used the expression "provided for," the strong inference is that he meant provided for by his will. There are other

instances in which he made statements that may be regarded as having reference to his will. They were, however, very general expressions and without the others would not be of much weight.

But upon the whole the evidence is ample to sustain the finding that the paper produced by the plaintiff is a copy of the will executed by the testator on the 28th of June, 1897.

The plaintiff's action in making a copy of the will and preserving it without communicating the fact to the deceased, although aware of the latter's aversion to any one becoming acquainted with its contents, was commented upon, and properly so, by counsel for the appellant. As a solicitor the plaintiff was quite justified in retaining and preserving the memorandum of instructions which he made at the time, as well for his own protection as for reference in case of any question arising concerning the will. And, ordinarily, there can be no objection to a solicitor making and keeping a copy of the will as drawn by him. He could certainly retain a draft made by him on the same principle as that of retaining his instructions. In this case, however, the plaintiff was aware of the declared objection of the deceased to the contents of the will being known, and his desire for secrecy, and therefore he should not have taken or kept the copy without informing the deceased. And his action in this respect naturally provoked some suspicion, and led to comments upon the weight to be attached to his testimony in other respects. But this error of judgment ought not to outweigh the circumstances and the general effect of his testimony.

Turning now to the question of the continued existence of the will: There are many circumstances in evidence which go to rebut the presumption of intention to cancel or revoke the will. The appellant complains that the plaintiff and those in the same interest, were permitted to lead evidence on this branch in a manner calculated to prejudice the appellant, and by means of which he was prejudiced. The objections are chiefly with regard to the reception of evidence of statements alleged to have been made by Mrs. McIntyre, tending to attribute the disappearance of the will to her act, and to the ruling that after Mrs. McIntyre was examined in chief by her

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own counsel she should be cross-examined by counsel for the appellant and afterwards by counsel for the plaintiff and others in the like interest. The learned Judge ruled in the first instance that statements alleged to have been made to or in the hearing of witnesses were admissible as evidence, not only against herself, but against all parties, including the appellant, and also that her depositions taken before trial for purposes of discovery were admissible to the same extent. These rulings were strenuously objected to, but the evidence was admitted and given in accordance with the ruling. Afterwards on reconsideration, the learned Judge corrected his ruling, and held that the evidence was only admissible as against the defendant Mrs. McIntyre. It is objected that Mrs. McIntyre was in the same interest as the plaintiff and her co-defendants, and that the evidence ought not to have been admitted at all. But Mrs. McIntyre had not taken the same position as her co-defendants. She had traversed the allegations of the plaintiff's statement of claim, and the plaintiff was entitled to prove them as against her by any evidence which would be binding on her, and to that extent the evidence was clearly admissible, but it could not and should not be permitted to prejudice the appellant's case.

With regard to the order of conducting the cross-examination of Mrs. McIntyre, it would have been more satisfactory if the learned Judge had directed that her cross-examination by the plaintiff, and those in the same interest, should follow her examination in chief, leaving the final cross-examination in the hands of the counsel for the appellant. But this was a matter entirely in the discretion of the trial Judge. Even if he had directed the plaintiff and others to first cross-examine, it would not have been improper for them to have treated her as a witness called by an opposite party, and to put leading questions to her: *Parkin v. Moor* (1836), 7 C. & P. 409; though if she had appeared very willing to aid the plaintiff's case the learned Judge might have stopped it, and manifestly it would greatly lessen the value of the testimony. But it cannot be said that Mrs. McIntyre was friendly to the plaintiff, or disposed to assist him, and in some respects her evidence tended less to his advantage than to the advantage of the appellant.



Making every allowance for any disadvantage the appellant may have been placed in by the rulings, and discarding from consideration all parts of Mrs. McIntyre's testimony, and of her alleged statement to others that were not receivable against the appellant, there yet remains ample evidence to support the finding of the testator's adherence to the will up to the time of his death. On this branch of the case his declarations and acts already spoken of are cogent evidence that up to a comparatively recent period before his death he had not changed his intention. The evidence of his being greatly displeased with the plaintiff's father and brother, and of his having transferred his legal business to Mr. Hall, is explained, and there is much evidence shewing that for a considerable time before and up to the date of his death he was consulting with, and being advised and assisted in the transaction of his business by, the plaintiff to a greater extent than at any former period. If by reason of a newspaper article in 1895, and in consequence of which he instructed Mr. Hall to endeavour to ascertain the author, he was irritated with the plaintiff, the feeling had subsided before June, 1897, or he would not have entrusted him with the preparation of his will. And again, the feeling he expressed to Mr. Hall in 1898, in consequence of the second article, was not at all directed against the plaintiff but against his brother, for whom he always entertained feelings of dislike, and although in 1899 he spoke to Mr. Hall of not leaving his business or papers in the office of Stewart & Rogers while the plaintiff was a member, the evidence shews distinctly that he did not act on that expression.

Expressions are attributed to him by some witnesses tending to create an impression that he at times was contemplating changes in the disposition of his property, but there is nothing to lead to the conclusion that he had ever made another will, or had destroyed the existing will with a view to making a different disposition.

A man of his intelligence and knowledge intending to make another will would not destroy the existing one without at the same time executing another. He was well aware of the consequences of intestacy in his case, and with his well known desire to prevent the property falling into the hands of the

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Government, it is not to be supposed that he had done the very act which would bring about that result. The will was taken by him into his own custody. In his home there was a valise which he spoke of as containing valuable papers. The key of this he kept in the pocket of his trousers, and it was found there after his death. On the day of his death the valise was removed, with some boxes and articles of furniture, from the hall or room in the front of the house, to a room upstairs. When removed the valise was heavy as if full of papers or other articles. The next morning it was seen with the lock forced open and empty. The contents have not been since discovered or seen. There is no reason to suppose that it had been opened or handled by the deceased from the day he was attacked by his last illness to the time of his death. It is not necessary to ascertain whose was the act of breaking open the valise and abstracting its contents. It is quite evident that it was not done by the directions or with the knowledge of the testator.

The evidence shews that during his last illness his mental attitude towards the plaintiff, his mother, Miss Hamilton and Frank Walker remained unchanged. And except as to plaintiff, no motive or reason for any change is suggested. The deceased's statement to Mr. Hall in July, 1899, to the effect that he had it all blocked out and settled except as to what he would give Mrs. Stewart, is consistent with the will of June, 1897, being still in existence, but that he was considering a change in form of the provision for her. Indeed, all remarks that are attributed to him (and they are not many) indicating some different disposition of his property, go no further than to shew that he was considering changes in his will to which he never gave effect. But they are far from leading to the conclusion that he had done away with it, or intended to do so except by some other testamentary paper. He never gave Mr. Hall any instructions to prepare another or any will. If, as suggested in Mrs. McIntyre's evidence, he made a holograph will, it is not to be conceived that evidence of it would not have been forthcoming from one or both of the witnesses whom he must have got to attest it.

The conclusion on the evidence must be, that up to the time of his death, he adhered to the will of the 25th of June, 1897, and that the appeal fails.

It is a matter of regret that the evidence of Mr. Hall should have been objected to, and a full disclosure of his testimony prevented at the trial, thereby leading to much delay and additional expense.

In view of all the circumstances, there should be no costs of the appeal, including those incurred in taking Mr. Hall's evidence before the Court.

We do not interfere with the disposition made of the costs of the action.

OSLER, J.A.:—I concur in the result. In justice, however, to the plaintiff, whose conduct in making and keeping a copy of the testator's will was bitterly commented upon by the appellant as if it tended to cast some doubt upon his testimony, I feel bound to say that in my opinion the plaintiff acted with perfect propriety in this respect, and that his conduct is not open to any, the least, unfavourable observation. The copy was kept as secretly as his own knowledge of the transaction, and it appears to me that in the absence of a direct prohibition by the testator it was as natural and proper in the testator's own interest to do so as to preserve the written memorandum of instructions.

MACLENNAN, J.A.:—This is an appeal from a judgment of MacMahon, J., establishing against the Attorney-General of Ontario the last will of John A. McLaren, deceased.

There are two questions in the case—first, whether the contents of a will which is proved to have been duly executed on the 25th of June, 1897, have been sufficiently proved; and second, whether, no will having been discovered after the testator's death, the presumption of revocation has been sufficiently rebutted.

The will was not read over in the presence of the witnesses at the time of its execution, and the only witness who proves its contents is the plaintiff, who is named executor therein, and who is the residuary legatee, and whose share of the estate, if

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the will be established, will amount to a very large sum. The plaintiff was a nephew by blood of the testator, who was illegitimate and had no children; and he had also been for some time before the execution of the will his solicitor, and continued to be his solicitor until the time of his death. The plaintiff's evidence is that at the time of making the will he made a copy of it which he retained in his possession until after the testator's death, and that he gave the original immediately after its execution to the testator who retained it in his possession. There is no evidence that any one ever saw the will after it was delivered to the testator, and there is no evidence whatever of the contents of it but that of the plaintiff.

Two points have been made upon this state of facts against the plaintiff, viz., that having drawn a will which gave him a very large benefit, the onus was cast upon him of shewing the righteousness of the transaction, and that the corroboration of his own evidence, required by section 10 of the Evidence Act, was wanting.

It is unfortunate that the plaintiff did not insist on the will being read over in the presence of the witnesses, but that may be accounted for by the testator's strong wish that no one should know what his intentions were as to the disposition of his estate. It would also have been more prudent if the plaintiff had declined to draw a will under which he was to take a large benefit, and had required his client to employ some other solicitor.

I am, however, of opinion, after some hesitation, that the plaintiff has discharged the onus of shewing that the transaction was righteous as required by the judgment of the House of Lords in *Fulton v. Andrew* (1875), L. R. 7 H. L. 448, at p. 471. He has shewn by abundant evidence that the testator was an active and shrewd business man who had accumulated a large property, and continued to carry on his business with keen personal attention until his death on the 11th of December, 1901, four years after the making of the will. The plaintiff says the testator took the will into his own personal possession immediately after execution, and I think, having regard to the evidence, he was the last man who would sign any paper, least



of all a will, which was not according to his mind, or without knowing and understanding its contents.

I am also of opinion that there is the corroboration required by the Evidence Act of the plaintiff's evidence of the contents of the will.

The will contains two particular legacies, one to Minnie Hamilton, a young woman in whom he was very much interested, and another to Frank S. Walker, who had been in his employ for about nineteen years. The legacy to each of these persons is \$5000. Each of them testifies that between the making of the will and his death he had in unmistakable language intimated to them respectively that he had made provision for them, which could only mean in and by his will. I think that according to the decided cases that is sufficient corroboration of the plaintiff's evidence of the contents of the will. It was objected that statements made by the testator after the date of the will were inadmissible to prove its contents, but the contrary was expressly decided by the Court of Appeal in *Sugden v. Lord St. Leonards*, 1 P.D. 154.

The remaining question is whether the presumption of revocation is sufficiently rebutted, and I think it is. At the time the will was made the testator was about 66 years of age. He was aware of his illegitimacy, and that in the event of his dying intestate his estate would devolve upon the Crown. The evidence is abundant that he did not intend to die intestate. His last illness was of five or six days duration. If he had destroyed his will, he had plenty of time to have made another during his illness. It is therefore extremely improbable that he revoked his will. On the other hand there is a very large body of evidence which makes it equally probable that the will was abstracted from the valise in which he kept valuable papers, and destroyed.

I think the very full and elaborate judgment of my brother MacMahon at the trial is well warranted, and I agree entirely with his reasons and the result at which he arrived.

The appeal should be dismissed.

GARROW, J.A.:—I am of the same opinion.

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## IN RE BLACK EAGLE GOLD MINING COMPANY.

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*Sheriff's fees—Poundage—Money paid before Sale—Possession Money—Con.  
Rules 1190, 1192.*

Where a sheriff made a seizure under writs of *fiery facias* of personal property of the judgment debtor; and a few hours before the sale, the judgment debtor came to him and paid the judgment debts in full:—

*Held*, that the sheriff was entitled to poundage on the full amount of the judgment debts, and not merely on the value of the property seized.

*Held*, also, that under the circumstances of this case \$2.25 per day was not too much to allow for possession money.

THIS was an appeal by the sheriff of the provisional judicial district of Rainy River from an order of his Honour T. W. Chapple, local Judge, dated June 23rd, 1903, refusing him poundage under the following circumstances:—

The sheriff had seized and advertised the personal property of the defendant company for sale under writs of *fiery facias* issued in a number of actions against the Black Eagle Gold Mining Company, and in his hands. Meanwhile, winding-up proceedings were commenced against the company, and to stay these proceedings the solicitor for the company came to the sheriff's office, and, having ascertained the amount due on the writs, paid it to the sheriff within an hour or so before the time advertised for the sale. The local Judge held that the money had not been made by the sheriff, and that the sheriff was not entitled to charge poundage thereon, but was entitled only to such allowance as the Court might make. He allowed the sheriff \$2.25 per day possession money. There was a cross appeal on behalf of the judgment debtor in respect to the amount thus allowed for possession money.

The motion was argued before FALCONBRIDGE, C.J.K.B., in Chambers, on September 23rd, 1903.

*W. M. Douglas*, K.C., for the sheriff, contended that the money had been made by the sheriff; that neither Rule 1190

nor 1192\* had any application; that where money is paid to a sheriff it is to be considered made under the execution: *Consolidated Bank v. Bickford* (1877), 7 P.R. 172; *Thomas v. Cotton* (1853), 12 U.C.R. 148; *Morrison v. Taylor* (1882), 9 P.R. 390; Consolidated Rules, Tariff C, items 39, 40, 41; Holmsted & Langton's Judicature Act, p. 1503; that the money here was paid on the executions for the purpose of preventing the sale taking place that morning.

*N. W. Rowell*, K.C., for the judgment debtor, contended that sheriff's poundage was matter of statute right only, and was given the sheriff in view of his risk in keeping possession of the goods: *French v. Lake Superior Mineral Company* (1892), 14 P.R. 541; that Rule 1190 governs sheriffs' rights, and only gives poundage where the sheriff has sold goods and made the money: *Weegar v. Grand Trunk R.W. Co.* (1894), 16 P.R. 371; that the allowance made under Rule 1190, where the sheriff has not sold the goods, does not appear ever to exceed 28 per cent. of full poundage; that in any event the court

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\*1190.—(1) When part only is made by the sheriff on, or by force of an execution against goods and chattels, the sheriff shall be entitled, besides his fees and expenses of execution, to poundage only upon the amount so made by him, whatever be the sum indorsed upon the writ, and where the personal estate, except chattels real, of the judgment debtor is seized or advertised on or under an execution, but not sold by reason of satisfaction having been obtained, or from some other cause, and no money is actually made by the sheriff on or by force of such execution, the sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized, not exceeding the amount indorsed on the writ, or such less sum as the Court or a Judge may deem reasonable.

(2) Where land or chattels real of the judgment debtor have been advertised under an execution, but not sold by reason of payment or satisfaction having been otherwise obtained on, or within one month before, the day on which the property has been advertised to be sold, or any day to which the sale may be adjourned, the sheriff shall be entitled to the fees and expenses of the execution and the poundage only on the value of the debtor's interest in the property not exceeding the amount indorsed on the writ, or such less sum as the Court or a Judge may deem reasonable.

1192. Where any person liable on an execution is dissatisfied with the amount of poundage fees or expenses of execution claimed by a sheriff, the Court or a Judge may, before or after payment thereof, upon the application of such person, upon notice to the sheriff, if the amount appears to be unreasonable, notwithstanding that it is according to the tariff, reduce the same or order the same to be refunded upon such terms as may seem just.

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would not allow poundage in excess of the value of the goods seized, that is, at more than would have been got if the goods seized had been sold; that the discretion exercised under Rule 1190 should not be interfered with; and that \$2.25 per day for possession money was unreasonable; that \$1.25 or \$1.50 would have been a fair amount to allow.

*Douglas*, in reply, contended that the judgment debtors might be, as the mines were here, some 50 miles from civilization, and \$2.25 for possession money was reasonable; that there was no evidence on which to interfere with the amount of poundage; the value of the goods seized had nothing to do with that, but it depends on the amount made.

FALCONBRIDGE, C.J.:—I am of opinion that, under the circumstances, and on the authorities cited, the money paid to the sheriff was made under the execution, and that the Rules referred to do not apply to or supersede the effect of the earlier cases, and that the sheriff is entitled to full poundage according to the tariff. The order of the local Judge must be varied accordingly with costs of the motion to be added to the sheriff's poundage. I will not interfere with the \$2.25 allowed for possession money, which I think was a reasonable allowance under the circumstances of this case.

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[IN THE COURT OF APPEAL.]

IN RE TOBIQUE GYPSUM COMPANY.

COSTIGAN V. LANGLEY.

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Oct. 16.

*Company—Dominion Winding-up Act—Staying Proceedings in another Province—Staying Execution—Setting aside Sale—Summary Proceedings—R.S.C. 1886, ch. 129, s. 13.*

There is jurisdiction under sec. 13 of the Dominion Winding-up Act, R.S.C. 1886, ch. 129, to restrain proceedings against the company, even in actions outside the ordinary territorial jurisdiction of the Court, and the enforcing of an execution is a proceeding within this section:—

*Held*, therefore, that there was jurisdiction in the High Court in this Province to make an order staying proceedings under an execution in the hands of the sheriff of a county in the Province of New Brunswick, as had been done in this case.

But the sheriff having, notwithstanding, proceeded with the sale under the execution against the lands of the company, and executed a deed of the same to the purchaser:—

*Held*, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void.

THIS was an appeal from an order of Falconbridge, C.J., K.B., dated October 14th, 1902, made in the matter of the winding up of the Tobique Gypsum Company, Limited, particulars as to which, with the other circumstances of the case, are set out in the judgment. The appeal was argued on September 18th and 21st, 1903, before MOSS, C.J.O., and OSLER, GARROW, and MACLAREN, JJ.A.

*E. D. Armour*, K.C., for the appellants, contended that the original order staying proceedings was *ultra vires*; that the execution was not a proceeding within the meaning of the Winding-up Act, R.S.C. 1886, ch. 129, and that the mode adopted for impeaching the sale was not warranted by that Act: *In re Sun Lithographing Co., Farquhar's Claim* (1892), 22 O.R. 57; *Harte v. The Ontario Express and Transportation Co.* (1894), 25 O.R. 247.

*J. J. Foy*, K.C., for the respondents, contended to the contrary, and referred to *In re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371; *In re International Pulp and Paper Co.* (1876), 3 Ch. D. 594; *Baxter v. Central Bank of Canada* (1890), 20 O.R. 214; *In re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502; *In re General Service Co-operative Stores*, [1891]

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1 Ch. 496 ; *In re London and Devon Biscuit Co.* (1871), L.R. 12 Eq. 190 ; Buckley's Joint Stock Company Acts, 7th ed. pp. 259, 430 ; Dominion Winding-up Act, R.S.C. 1886, ch. 129, secs. 13, 16, 84, 85.

October 16. The judgment of the Court was delivered by Moss, C.J.O.:—Appeal by Mrs. Harriet Costigan, wife of the Honourable John Costigan, of the city of Ottawa, and James Tibbits, High Sheriff of the county of Victoria, in the Province of New Brunswick, from an order of Falconbridge, C.J., dated October 14th, 1902, made in the matter of the winding up of the Tobique Gypsum Co., Limited. The company having become insolvent within the meaning of the Winding-up Act, R.S.C., ch. 129, a petition was presented to the High Court on July 29th, 1902, on behalf of the Toronto General Trusts Corporation, executors and trustees of the estate of the late Hugh Ryan, a creditor of the company under the Act. It came on for hearing before Lount, J., in presence of counsel for the petitioners and the company. From affidavits filed, it appeared that one John P. Dunne, the secretary of the company, had obtained a judgment against it in the Courts of New Brunswick for an amount exceeding \$500 upon which executions were in the hands of the sheriff, Mr. Tibbits, who was proceeding thereunder to expose for sale the lands of the company, and that the sale was advertised to take place on the 1st of August. It was sworn that there was reason to believe and apprehend that unless the order declaring the company to be insolvent was made the sheriff would proceed with the sale on the day named. Application was made to the learned Judge on behalf of the company for an adjournment of the application. He directed the application to stand adjourned for one week, or until the 5th of August, and at the same time made an order that all proceedings in any action, suit, or proceeding against the company be stayed in the meantime. So far as Dunne, the execution creditor, was concerned, this order was *ex parte*, but the evidence shews that he had already agreed to a postponement of the sale for one month, and had instructed the sheriff to that effect.

On July 29th the petitioners' solicitors wrote to the sheriff advising him of the order for stay of proceedings. This letter and a letter from Mr. Dunne's solicitor, dated July 30th, 1902, advising the sheriff of the pendency of the petition, and instructing him to postpone the sale for a month, were received by the sheriff, before the sale, and there is no reason to doubt that the sheriff would have acted upon these communications and postponed the sale but for the interference of Mr. Costigan, the president of the company. On July 30th the solicitor for the petitioner sent to the sheriff a certified copy of the order staying proceedings. On August 1st the sheriff assumed to put the lands up for sale, and after two other bids the property was knocked down to Mr. Costigan, bidding, as he says, on behalf of his wife, at the sum of \$900. On August 5th an order was made on the petition declaring the company to be insolvent, and liable to be wound up by the Court under the Winding-up Acts, and a further order was also made appointing James P. Langley provisional liquidator, and referring it to the Master in Ordinary to appoint a permanent liquidator, or liquidators, with the usual directions. Copies of these orders were transmitted to the sheriff, who received them on or about August 7th. On August 15th the sheriff executed a deed of the lands to Mrs. Costigan, and on the next day she executed a mortgage upon them to one Henry A. Little, of Woodstock, Ontario, to secure an advance of \$1,000. These two instruments have been registered in the registry office for the county of Victoria, New Brunswick. The sum of \$900 was paid to the sheriff, by whom it was placed on special deposit, where it now is.

On October 14th, 1902, the liquidator and the petitioning creditors moved, on notice to John P. Dunne, the execution creditor, the Hon. John Costigan, Harriett S. Costigan (his wife), Henry A. Little, and the sheriff, for an order declaring the sale void. John P. Dunne and Henry A. Little did not appear, or oppose the motion, but it was opposed by Mrs. Costigan and the sheriff, who now appeal from the order pronounced, and by Mr. Costigan.

The motion was supported and opposed on affidavits filed and depositions taken, and was heard by Falconbridge, C.J.,

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who pronounced an order declaring the sale void, and ordering that the conveyance be set aside, and that Mrs. Costigan and Henry A. Little do execute a deed of quit claim of the property, and that Mr. and Mrs. Costigan and the sheriff pay the costs of the application.

The appellants contend that the order was made without jurisdiction, because it affects lands in another Province, and because the subject matter was not one proper to be dealt with in a summary manner by a Judge on the winding up proceedings. It was also contended that the order of July 29th, made by Lount, J., was made without jurisdiction, and that it did not operate as a stay of the proceedings under the execution, and that the sale, made on August 1st, was a valid sale and disposition of the property, and further that, on the merits, the facts did not justify the setting aside of the sale. The last point was but faintly argued, and we are not called upon to decide it, for we are of the opinion that there was an effective stay of proceedings on the day when the sale took place.

The petition having been presented on July 29th, there was jurisdiction under sec. 13 of the Act to restrain further proceedings in any action, suit or proceeding, against the company, and the enforcing of an execution is a proceeding within the section: *In re Artistic Colour Printing Co.*, 14 Ch. D. 502. Further, the jurisdiction to restrain extends to proceedings in actions or suits beyond the ordinary territorial jurisdiction of the Court, more especially when, as in this case, the execution creditor is resident within the jurisdiction: *In re International Pulp and Paper Co.*, 3 Ch. D. 594.

Usually the application is made on notice to the plaintiff in the action or suit, but in a proper case the order may be made on an *ex parte* application. In the case *In re The London and Suburban Bank* (1871), 19 W.R. 950, Wickens, V.-C., made an order *ex parte* under sec. 85 of the Companies Act, which is identical in terms with sec. 13 of our Act, restraining creditors who were proceeding with actions, pending the hearing of a petition to wind up the company. Respecting this practice, it is said in Lindley on Companies, 6th ed., at p. 911, "This practice was adopted, after consideration, by V.-C. Wickens, in *Lon-*



*don and Suburban Bank* and has been followed since the Judicature Act by all the divisions of the High Court." In *Masbach v. Anderson & Co.* (1877), 37 L.T.N.S. 440, the Court of Queen's Bench granted an order *ex parte* staying proceedings in actions pending at the time of the presentation of a winding-up petition. There appears to be no good reason why this should not be done in these, as in other applications, for injunctions where the circumstances of the case do not permit of delay.

Therefore, Lount, J., had jurisdiction to make an order staying proceedings in the action of Dunne against the company. The order was not specially directed against Dunne, or his action, but was general in its terms, and this is objected to.

The more correct practice, and that which should have been followed, is to specify each action or proceeding, and to restrain the proceedings in it, but the departure in this case did not deprive the order of force. The parties to the action were notified of the order, and Mr. Dunne, who was the person most interested, recognized and submitted to it. No doubt, also, it would have been more in accordance with the ordinary practice if the order had contained the usual undertaking as to damages, but it was for the learned Judge to impose such terms as he thought fit. No motion was made against the order, and even now Mr. Dunne does not complain of it. Notwithstanding the order, the sheriff assumed to proceed with the sale, at the instance of Mr. Costigan, the president of the company, whose duty it was to have aided in staying the proceedings. He was aware of the petition and also of the order staying proceedings, and there was no excuse for his and the sheriff's conduct in proceeding in the face of it. The order was operative until successfully moved against, or the parties were relieved of the stay and given leave to proceed, notwithstanding the winding up proceedings. The argument that there was no valid stay, and that the sale was therefore good, completely fails.

The formidable objection to the order appealed from is that the mode adopted of impeaching the sale, and subsequent proceedings, is not warranted by the Act. This case is not one coming within the classes of cases which, under the Act, may be dealt with in a summary manner by a Judge in the winding-up proceedings. In general the summary powers cannot be exercised

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against persons who do not come within some or one of the classes of persons specified in the sections of the Act governing the summary exercise of powers. Mrs. Costigan and Mr. Little are entire strangers, in the sense that they are not contributories, creditors, officers, or trustees, but they are the persons whose alleged rights in the land are affected by the order

Parliament has given the Court, or a Judge, authority under the Winding-up Act, to deal in a specified way with given classes of cases in which persons falling under the above descriptions are concerned, but the fact that it has done so does not justify the Court in extending the jurisdiction to other cases not within the terms of the Act: *In re East of England Bank, Feltom's Executors' Case* (1865), L.R. 1 Eq. 219. So far, therefore, as Mrs. Costigan and Mr. Little are concerned, the case is not one to be dealt with in a summary proceeding.

Messrs. Dunne and Costigan, and perhaps the sheriff, occupy a different position, but the fact that they might be dealt with in a summary proceeding does not create jurisdiction over the others who are not in their position.

As against Mrs. Costigan and Mr. Little, the order cannot be supported, more especially, as regards that part which directs the execution by them of a conveyance, or quit claim, of the lands. It should, therefore, be vacated; but the circumstances are such as to warrant us in saying that there should be no costs of the proceedings, or of the appeal.

A. H. F. L.

## [DIVISIONAL COURT.]

MOONEY v. GROUT.

D. C.

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Nov. 13.

*Contract—Services by Near Relations—Implied Right to Remuneration—Presumption.*

The presumption against an implied right to remuneration for services rendered by near relations arises only when the persons rendering the services, and those to whom they are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may, in the case of near relations, be negatived on very slight grounds.

The Court held, on the facts in this case, that the plaintiff, a married woman who left her home to nurse her sister, was not entitled to remuneration for her services.

Judgment of Meredith, C.J., C.P., affirmed.

APPEAL by the plaintiff from the judgment at the trial.

The action was brought to recover for services rendered by the plaintiff to her sister Frances Mooney, deceased, the defendant being the executor of her will.

The plaintiff was a married woman living with her husband at East Hawkesbury; the deceased sister was a widow without children living by herself at Vankleek Hill, five miles from the plaintiff's residence. On the 2nd of November, 1901, the deceased having been taken ill, sent for the plaintiff to go to her to nurse her. The plaintiff went and found her in bed, and remained with her at her request, nursing her at the house of the deceased until the 12th of May following, with some short intermissions. On the 12th of May, 1902, the plaintiff being unable to remain away from her own home any longer, the deceased was moved to the plaintiff's house, where she remained until she died on the 31st of July, 1902. During all this time the plaintiff nursed her and cared for her in every way. The work she was obliged to do was of a most disagreeable, dangerous, and trying character owing to the nature of the malady—cancer of the womb—from which the deceased was suffering.

The deceased was, at the time of her death, the owner of a small house and lot worth about \$1,800, of some household furniture of small value, and of about \$1,250 in cash and mortgages.

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She had made a will in February, 1901, and another in February, 1902, in each of which she had given to the plaintiff the house and lot for her life, and the income of the money also for her life. She had told the plaintiff some months before her illness that she had made a will, and the plaintiff swore that she understood that she was to have the house and lot for her life, but that the money was to be hers absolutely. The plaintiff swore that, believing this to be the case, she had not intended to make any charge for her services to the deceased, to whom she was much attached, but that, after the death of the deceased, upon hearing the will read, she was very greatly surprised, and determined to claim to be paid.

The action was tried at L'Orignal on the 26th of April, 1903, before MEREDITH, C.J.C.P., who, at the close of the case, gave the following judgment:—

MEREDITH, C.J.:—The law applicable to such cases as this is well settled. Where services are performed between strangers without any agreement as to compensation, the law implies that a reasonable compensation is to be paid, from the fact of the services having been rendered at the request of the person for whom they have been so rendered. But where the parties are in such relationship to one another as were these two sisters, the law is that no such presumption arises, and the duty rests upon the person who seeks pay for services rendered under those circumstances to prove a contract express or implied.

Now, here it is perfectly clear that there never was any idea on the part of the plaintiff that she was to be paid for her services. We have her own repudiation of that repeated from time to time. She says very frankly that she became very indignant when she found that the terms of the will were, as she thought, most unjust to her, and not what her sister had told her were its terms, and that she then for the first time made up her mind to make a claim for her services. That indicates to me that there was no such relationship as that of master and servant, and nothing from which there could be inferred a promise to pay. I think it was plainly a case where the one sister was moved, largely by affection, but probably



also, for even the best of us are not unaffected by material considerations, the fact being that the other sister had no other relatives to whom to leave her property, by the expectation that the property would come to her, or the greater part of it. But there was no promise on the part of the sister of the plaintiff to make the will. The plaintiff had every confidence in her sister, and was content to rely on whatever she would do; believing, as she says, that she would give her the house for her life, and the personal property absolutely.

The cases that have been cited are entirely distinguishable. In one of those cases the person whose estate was made liable had promised to make a will, and in the other to give land or property or to make provision for the person bringing the action, and had failed to do so; and what was held was that, the contract having been broken, and there having been consideration for the services, the person was entitled to compensation, or to what is called in law a *quantum meruit* for the value of the services which had been rendered.

As I have said, no such case is made here. There was no promise on the part of the deceased to make a will in favour of the plaintiff. There was a statement of what she had done in the way of making a will, and I am quite clear that the case is one in which the plaintiff relied upon the bounty of her sister, and not upon any legal obligation arising from any contract entered into between her and the sister.

If the case had been made out that the sister had represented, in order to get these services performed, that she had made a will leaving the money as well as the other personal property absolutely to the plaintiff, it is possible that there might be some means of reaching the estate of the deceased. But, while I acquit entirely the plaintiff of any dishonesty in the transaction, and of any wilful misstatement in the box as to what was said by her sister, I am unable, especially in view of her cross-examination for discovery, where the language she then said was used by her sister differs materially from the language in the witness-box she now says was that used, to come to the conclusion that the sister ever did tell her that she had given her absolutely by her will money, as well as other personal property. It is most unsafe to depend upon the recol-

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lection of a witness, especially a witness who is very much interested in the subject matter which is being enquired into, as to words said by a person in the position of this dead woman. It is so easy to take up the wrong word, to misunderstand, to remember incorrectly; and, indeed, the plaintiff herself said that she did not pretend to say what the words used by her sister were. The meaning that she drew from them, as she put it, was that her sister had left the property to her absolutely. Judges have over and over again called attention to the danger of relying upon evidence of conversations. Perhaps that does not apply so much to the conversation with the plaintiff as it does to the conversation with Mrs. McNeil. I can quite understand that the statement that the deceased made to Mrs. McNeil was a statement in exact accordance with the provisions of the will in regard to the personalty, and yet that Mrs. McNeil has come here in perfect honesty and stated it in the language she used in the witness-box.

So that I am unable to come to the conclusion that there was any such promise or any such statement by the deceased as that she had left the money as well as the other personal property absolutely to the plaintiff, or that she would do so.

At the time that this conversation took place a will had been made, and by the terms of the will, in the most explicit language, which the deceased must have perfectly understood—I see the will is witnessed by a professional gentleman—she provided that the money which belonged to her should be for the plaintiff only for her life, and that the capital should go elsewhere on her death. She then, after the services had begun to be rendered—had been partly rendered—made another will, by which she made the same disposition, only altering it to the extent of changing the name of one of the executors appointed by the earlier will.

Now, the plaintiff very properly, with a sisterly feeling, repudiates the idea that her sister would have done anything improper with regard to her; and yet, what she is practically asking me to do is to find that the sister, getting these services, which were no doubt most valuable to her, was deliberately telling her a falsehood as to the disposition she had made of her

property. I cannot believe that. I cannot believe it when the plaintiff speaks of her sister in the terms in which she does.

I therefore have no hesitation in coming to the conclusion to which I come, that I cannot give any relief to the plaintiff.

I think it is unfortunate that some arrangement could not have been made whereby the plaintiff should have got a larger compensation. No doubt the work she had to perform was of such a character that scarcely anybody would have performed it. No doubt a great part of it—perhaps all of it—was done from sisterly affection. That, however, is not for the Court—it is only for the consciences of the parties; and perhaps by the terms of the will the executors were precluded from doing it.

I think the defence has acted very wisely and very properly in not asking costs against the plaintiff. Otherwise the result would probably be that the little she gets under the will would be taken away from her entirely.

On the finding I make, therefore, I dismiss the action without costs.

The appeal was argued before a Divisional Court [STREET, and BRITTON, JJ.] on the 3rd of November, 1903.

*Clute*, K.C., and *J. A. MacInnes*, for the appellant. The learned Chief Justice has, it is submitted, stated too broadly the rule as to payment for services rendered by relatives. The presumption against the implied right to payment does not arise unless the services are rendered at a time when the person rendering the services and the person to whom the services are rendered are living together as members of the same family. Here the plaintiff was specially sent for, and the nature of the services—an element always considered in cases of this kind—was such that remuneration should be allowed: *Peckham v. Depotty* (1890), 17 A.R. 273; *Iler v. Iler* (1885), 9 O.R., 551; *Redmond v. Redmond* (1868), 27 U.C.R. 220; *Walker v. Boughner* (1889), 18 O.R. 448; *McGugan v. Smith* (1892), 21 S.C.R. 263; *Murdoch v. West* (1895), 24 S.C.R. 305.

*Marsh*, K.C., and *Frederick Postlethwaite*, for the respondents. The finding that the claim of the plaintiff was an after-thought—the result of the disappointment of her expectations—is

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fully supported by the evidence, and disposes of the case. Apart from this, the presumption against any right to payment has not been rebutted. That presumption is not limited to cases of persons living together, and the services, though admittedly of a most disagreeable nature, were such as would necessarily be rendered by a person acting as nurse, and were not, as were the services in question in *McGugan v. Smith*, of an extraordinary nature. See Article, 26 Central L.J. 51; *Re Ritchie, Sewery v. Ritchie* (1876), 23 Gr. 66; *Candor's Appeal* (1843), 5 Watts & S. 513; *Hartman's Appeal* (1859), 3 Grant's Cas. (Pa.) 271; *Duffey v. Duffey* (1863), 44 Pa. St. 399. No agreement to remunerate by will has been made out; there was merely an expectation of benefit: *Le Sage v. Coussmaker* (1794), 1 Esp. 187; *Swires v. Parsons* (1843), 5 Watts & S. 357; *Martin v. Wright's Administrators* (1835), 13 Wend. 460; *Baxter v. Gray* (1842), 3 M. & G. 771; *Smith v. Smith* (1898), 29 O.R. 309, (1899), 26 A.R. 397; *Cross v. Cleary* (1898), 29 O.R. 542.

November 13. The judgment of the Court was delivered by STREET, J. (after stating the facts):—After a great deal of consideration, I find myself unable to come to the conclusion that the result arrived at by the Chief Justice can be interfered with.

It is true that the plaintiff and her sister, the deceased, each had her separate household at the time the plaintiff was requested by the deceased to take care of her in her illness. Under these circumstances the presumption, which arises in the case of services rendered by members of a family living together to one another, that such services are not to be paid for does not, I think, arise. But the presumption that services rendered by one sister to another when they are not living together as members of the same family are to be paid for is much more easily rebutted than it would be if the services had been rendered to a stranger. In the present case the plaintiff says that, until after the death of her sister, and until she heard the contents of her will, she had no intention of making a charge for her services. Nor is there any reason to suppose that the deceased ever thought that the plaintiff expected to be paid. If either of them had supposed that the plaintiff was



working for hire, it is but reasonable to think that the matter would have been mentioned during her nine months' attendance on the deceased. In the absence of any offer of, or request for payment during all that time, I think we may properly assume under the circumstances an understanding on the part of both that the provision in the will of the deceased in favour of the plaintiff was to be her remuneration for her trouble, and that no charge would be made. This being the case, there was no contract while the services were being rendered, and the plaintiff had no right to claim pay for them upon finding that the income of the money only, and not the principal, had been bequeathed to her: *Osborn v. Governors of Guy's Hospital* (1726), 2 Str. 728; *Baxter v. Gray*, 3 M. & G. 771; *Roberts v. Smith* (1859), 4 H. & N. 315; *Robinson v. Shistel* (1873), 23 C.P. 114; *Morris v. Hoyle* (1878), 28 C.P. 598; *Markey v. Brewster* (1877), 10 Hun (N.Y.) 16; Wood's Law of Master and Servant, 2nd ed., sec. 76; *Maddison v. Alderson* (1883), 8 App. Cas. 467; Smith's Law of Master and Servant, 4th ed., p. 202.

In my opinion, the appeal should be dismissed, with costs.

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## [IN THE COURT OF APPEAL.]

## MAJOR v. MCGREGOR.

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*Defamation—Libel—‘S.B.’—Innuendo.*

Oct. 16.

The defendant a tax-collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and mailed to the plaintiff a post card stating “I saw J. S. this morning; he said make the S. B. pay it.”

In an action for libel, in which the plaintiff claimed that “S. B.” applied to him, and meant “son of a bitch.”:—

*Held*, that in its primary and obvious meaning the language of the post card was harmless; and the letters “S. B.” not having acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression, and the plaintiff having given no evidence that they conveyed the meaning attributed to them by him, he had failed to establish any cause of action.

THIS was an appeal by the plaintiff from the judgment of Britton, J., at the trial of this action, reported 5 O.L.R. 81, where, as also in the judgment of this Court, the facts are fully stated.

The appeal was argued on September 18th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

*G. F. Shepley*, K.C., for the appellant, contended that the question of the libellous character of the letters “S.B.” should have been left to the jury: *Hart v. Wall* (1877), 2 C.P.D. 146; *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; *Australian Newspaper Co. v. Bennett* [1894], A.C. 284; *Nevill v. Fine Art and General Ins. Co.* [1897], A.C. 68; *Hoare v. Silverlock* (1848), 12 Q.B. 624; *Bailey v. Kalamazoo Publishing Co.* (1879), 40 Mich. 251; *Bourke v. Warren* (1826), 2 C. & P. 307; *Levy v. Milne* (1827), 4 Bing. 195; *Rawlings v. Norbury* (1858), 1 F. & F. 341; *McGregor v. Gregory* (1843), 11 M. & W. 287.

*D. B. Maclennan*, K.C., for the respondent, contended that *Hart v. Wall* had been over-ruled in *Capital and Counties Bank v. Henty*, and relied on the latter. He also cited *Macdonald v. Mail Printing Co.* (1900-1), 32 O.R. 163, 2 O.L.R. 278.

October 16th. The judgment of the Court was delivered by OSLER, J.A.:—Action for libel tried before Britton, J., and a jury at Cornwall.

The case was that the defendant, a bailiff for the collector of taxes for the township of Charlottenburg, had demanded payment by the plaintiff of certain taxes and had been referred by him to one Sullivan as the person by whom they ought to be paid. The defendant applied to Sullivan who refused to pay and some conversation passed between them on the subject. Thereupon the defendant wrote and sent to the plaintiff a post-card in these words: "Williamstown, 20th, 1902. Mr. Major. Dear Sir,—I saw Jack Sullivan this morning, he said make the S B pay it; sell him out, who else should pay it but him? so go ahead. Now I will be obliged to sell your goods in a few days if not settled, so you had better attend to it at once and save further trouble. I will send posters this week. Yours truly, A. M. McGregor, Williamstown. This is the last notice."

The card was addressed to 'Telesphore Major,' by which name the plaintiff, whose name is also Zephrien, was sometimes called. He is unable to read. His father or his son, who are also illiterate, got it from the post office and gave it to the plaintiff's wife who read it to him. This was the libel complained of.

Ambrose Dunn deposed to a conversation with the defendant about the post-card in which the latter said that he had sent a post-card to the plaintiff, his words being: "I sent that post-card to that son of a bitch."

There was no other evidence of importance.

The learned Judge left the case to the jury reserving his decision on the motion for nonsuit. The jury found a verdict for the plaintiff for \$15, but the learned Judge being of opinion that the words were not actionable in their natural signification and that there was no evidence to show that they were capable of being understood in a defamatory sense, directed judgment for the defendant.

It is clear that this appeal cannot succeed. Taken literally and in its primary and obvious meaning the language of the post-card is harmless. The defendant simply purports to report to the plaintiff Sullivan's words referring to him as "the S B." If the trial Judge could have taken judicial notice that

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these letters like the letters A.D., E. & O.E., F.O.B., etc. were a familiar contraction for some common phrase or ordinary expression, and were commonly or even occasionally used as a contraction for the vulgar epithet which, by the innuendo, they are alleged to mean, it would have been proper to have left the case to the jury to say whether they were so used or intended to be used by the defendant on this occasion. It was impossible however, to argue that the letters had acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression. As they stand in the writing they are no more than two innocent letters of the alphabet—initials, it may be conjectured, of two words not intended to be complimentary, but of what two words and whether of a contemptuous or harmless meaning is unknown, and not capable of being known, either from the letters themselves or from anything in the context. Words in themselves harmless, for example ‘boy-cott,’ ‘de witt,’\* ‘beecher,’† have sometimes historically or from the circumstances of the time acquired an injurious meaning, or are capable of being used so as to convey one, and it is then for the jury to say whether they have been so used on the particular occasion, but this cannot be said of the letters in question and therefore the plaintiff fails to show that by themselves they are capable of a defamatory meaning. Their ordinary English meaning is of two letters of the alphabet and nothing more.

“Whenever the words used at the trial are not ordinary English but local, technical, provincial or obsolete expressions or slang, or cant terms, evidence is admissible to explain their meaning, provided such meaning has been properly alleged in the statement of claim. When the words are well known and perfectly intelligible English the Court will give them their ordinary English meaning, unless it is in some way shown that that meaning is inapplicable. This may appear from the words themselves, for in some cases to give them their ordinary English meaning would make nonsense of them. But if in their ordinary English meaning the words would be intelligible, facts must be given in evidence to shew that they may have

\*See Murray’s Oxford Dictionary, *sub voc.*

†See *Bailey v. Kalamazoo*, 40 Mich. 251.



been used in another special meaning on this particular occasion." Odgers on Libel and Slander, 5 ed., pp. 115, 116. In the latter case it is the office of the innuendo to bring out the latent injurious meaning ascribed by the plaintiff to the defendant's language: Odgers, *ibid.* pp. 106, 107; and the meaning alleged, and that this was the meaning understood by those to whom the libel was published, must be proved by evidence in the usual way.

Here the plaintiff, by the innuendo has undertaken to specify the particular defamatory sense in which the words or letters were used, but of that he has given no evidence and therefore the words themselves, not being defamatory in their ordinary meaning, he has failed to establish any cause of action.

We considered this subject very fully in the recent unreported case of *Lossing v. Wigglesworth*, 1902. See also *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, 744; *Neville v. Fine Arts & General Ins. Co.*, [1897] A.C. 68, Am. & Eng. Ency., 2nd ed., vol. 18, p. 973.

The judgment must be affirmed and the appeal dismissed with costs.

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BURDETT V. FADER.

Nov. 4.

*Injunction — Debtor Disposing of Property — Status of Creditor—Verdict for Damages—Fraud.*

The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property.

MOTION by the plaintiff to continue an interim injunction granted by a local Judge restraining the defendant from disposing of certain shares in an incorporated company so as to defeat the plaintiff's claim against the defendant. In this action the plaintiff had recovered a verdict against the defendant for \$700 for libel, but the entry of judgment had been stayed, and an appeal was pending.

The motion was heard by BOYD, C., in the Weekly Court on the 3rd November, 1903.

D. O'Connell, for the plaintiff, contended that he was entitled to an injunction until the final disposition of the action, citing *Longeway v. Mitchell* (1870), 17 Gr. 190; *Abell v. Morrison* (1876), 23 Gr. 109; *Turner v. Smith* (1879), 26 Gr. 198; *Hepburn v. Patton* (1879), *ib.* 597; *Campbell v. Campbell* (1881), 29 Gr. 252; *Parkes v. St. George* (1884), 10 A.R. 496, 542.

R. D. Gunn, K.C., for the defendant, relied on the cases collected in Holmsted and Langton's Jud. Act, p. 80.

November 4. BOYD, C.:—To interfere by injunction in this case to restrain the defendant dealing with his chattels appears to be opposed to authority and contrary to the practice of the Court.

The plaintiff has recovered a verdict in an action for defamation, in which the entry of judgment has been stayed, so that he is not yet a creditor—much less a judgment creditor; and with only this status he has obtained an *ex parte* injunction to

restrain the defendant from selling stock in a company, on affidavit alleging that it was with intent to defraud the plaintiff and to leave the country with the proceeds.

The plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.

There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained. See Parker on Frauds on Creditors, p. 211; Holmsted and Langton's Jud. Act, p. 80; *Newton v. Newton* (1885), 11 P.D. 13; *Campbell v. Campbell*, 29 Gr. 254.

I do not continue the injunction; costs to be disposed of when the action is determined.

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TORONTO GENERAL TRUSTS CORPORATION V. CENTRAL  
ONTARIO R.W. CO. ET AL.

*Railway—Mortgage on Undertaking—Bonds—Interest Coupons—Arrears—Real Property Limitation Act.*

The restrictions placed upon the right to recover arrears of interest charged upon land imposed by secs. 17 and 24 of the Real Property Limitation Act, R.S.O. 1897, ch. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The coupons are in effect documents under seal—the bond under seal containing a covenant for payment of the coupons—and they, therefore, partake of the nature of a specialty, and are good for at least twenty years.

APPEAL by the defendants Thomas Gibbs Blackstock and Robert Weddell from a certificate of the local Master at Belleville, dated 3rd October, 1903.

The plaintiffs were mortgagees under a mortgage dated the 1st April, 1882, made by the defendant company to secure their bonds. The defendant company having paid neither principal nor interest, this action was brought against the company to recover \$2,200,000 principal and interest upon the bonds, and in default of payment for a sale of the defendant company's railway and property. Judgment was obtained by the plaintiffs directing a reference to the Master, who added the appellants and one Samuel J. Ritchie, among others, as parties in his office, they being respectively the holders of a large number of the bonds of the defendant company with interest coupons, and the defendant Ritchie being the holder of a large number of the earlier maturing coupons which he had acquired from the original holders of the bonds.

The Master's certificate was as follows:—

"I certify that pursuant to the judgment herein dated the 23rd March, 1903, and the 6th April, 1903, I was attended by the solicitors for Thomas Gibbs Blackstock and Robert Weddell and Samuel J. Ritchie, and in the presence of the parties settled an advertisement calling upon all holders of bonds of the defendant company, and all persons having claims and charges on the undertaking of the company, to prove their



claims, which said advertisement having been duly published, I was attended, amongst others, by Samuel J. Ritchie, who claimed to be the holder of a large number of bonds with coupons attached and also a large number of detached coupons, all of which detached coupons had matured more than six years prior to the institution of this action, and objection having been raised by counsel for Thomas Gibbs Blackstock and Robert Weddell to the right of the said Ritchie to prove upon said detached coupons, and also all detached coupons which matured more than six years prior to the date of this action, and further to the right to charge the lands and undertaking of the defendant company with more than six years' arrears of interest, I proceeded in the presence of the parties to consider the said matter, and find that none of the coupons, whether they are attached or detached, are barred by the Statute of Limitations, and that they are all entitled to the same rank as the principal payable by the bonds."

The appeal was upon the ground that the Master should have held that the holders of bonds were entitled to charge the defendant company's lands and undertaking with merely the principal and six years' arrears of interest upon the bonds, and that all the detached coupons, and such of the attached coupons as matured more than six years prior to the maturing of the bonds, were barred as a charge against the defendant company's lands and railway, under the Real Property Limitation Act, R.S.O. 1897, ch. 123, secs. 17 and 24.\*

The appeal was heard by BOYD, C., in the Weekly Court, on the 3rd November, 1903.

\* 17. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, or action, but within six years next after the same respectively has become due, or next after any acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

24. No action or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

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*G. T. Blackstock*, K.C., and *T. P. Galt*, for the appellants, contended that the matter came within the express terms of secs. 17 and 24, citing *McMicking v. Gibbons* (1897), 24 A.R. 586, and *Colquhoun v. Murray* (1899), 26 A.R. 204. They also contended that an acknowledgment executed by the defendant company, of which the defendant Ritchie was president, could not affect the rights of the appellants, citing *Astbury v. Astbury*, [1898] 2 Ch. 111.

*J. H. Moss*, for the defendant Ritchie, contra, cited *Phelps v. St. Catharines and Niagara Central R.W. Co.* (1890), 19 O.R. 501, and *Jones on Railroad Securities*, sec. 332 *et seq.*

November 5. BOYD, C.:—The restrictions placed upon the right to recover arrears of interest charged upon land imposed by secs. 17 and 24 of the Real Property Limitation Act, R.S.O. 1897, ch. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The land contemplated by the statute is a very different thing from the railway undertaking upon which the interest is secured. That undertaking is an integral, indivisible property consisting of land, chattels, and franchises, which for the satisfaction of creditors or bondholders must be dealt with or sold in its entirety: *Redfield v. Corporation of Wickham* (1888), 13 App. Cas. 467, 476-7. The remedy sought in this case by the corporation holder is not by way of action or distress as specified in sec. 17 of the statute, but is claimed under special provisions which pertain to this railway. Default has been made in the payment of the principal money of the bonds, and the plaintiffs as trustees have proceeded under the 3rd provision of the statutory mortgage to enforce payment of the principal and the interest unpaid thereon.

All the bondholders are subject to and bound by the terms of this instrument, and the proceeding is for the common benefit of all. The very trust which is to be observed in case of default is that the trustees are to take possession by a receiver, which has been done, and then to proceed to realize by sale, as has been determined in this case. The extended direc-

tions given in the 2nd provision of the mortgage,† where default has been made in payment of the interest, provides for the payment of all interest due and unpaid upon the bonds. That is also the necessary import of the 3rd provision,‡ and it is repug-

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† Second :—In case default shall be made in the payment of any interest on any of said bonds issued or to be issued according to the tenor hereof by the company (defendant) and such default shall continue for the period of three months, it shall then be lawful for the said trustees (plaintiffs), and on request of holders of said bonds representing in amount seventy-five per cent. thereof it shall be their duty, by their attorneys or agents, with or without process of law—full power and authority being hereby given for that purpose—to enter into and upon all and singular the premises hereby conveyed or intended so to be, and each and every part thereof, and to have, hold, and use the same for the benefit of the holders of the said bonds issued under these presents to pay the interest thereon, operating, by themselves or by their superintendent, manager, receiver, or servants, or other attorneys or agents, the said railway, and conducting the business thereof, and making from time to time all necessary repairs and replacements, and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same and every part thereof, and from the proceeds of such receipts, after first reimbursing and indemnifying themselves against all costs, charges, and expenses of and incidental to the taking possession hereunder and in any way carrying out the provisions of this trust, and after being allowed a fair remuneration for acting as receiver aforesaid, then upon paying all ordinary expenses and charges of operating the said railway, and the costs of the said repairs and replacements, and all taxes and assessments and all other working expenses, said trustees shall pay the interest due and unpaid on said bonds, in the order in which such interest became due and payable, ratably, to the persons entitled thereto, and after paying all interest on said bonds of which default was made by said railway company, and all interest which shall have fallen due on said bonds thereafter, so that no interest shall remain unpaid and no default shall exist in anything herein required to be done or kept by said railway company, then the trustees shall restore possession of the property, railway, franchises, and appurtenances to the said railway company or its successors, and as often thereafter as said company shall so make default in the payment of interest or in anything to be done or kept by said company, on such further request of said bondholders in number and amount as herein stated, said trustees shall take possession of all the property and effects hereby mortgaged or intended so to be, and operate said railway and property as hereinbefore stated, and pay the interest in default of payment as provided.

‡ Third :—In case default shall be made in the payment of the principal of said bonds issued or to be issued under these presents, when the same shall become due and payable according to the terms thereof, at the request of said bondholders to the said number and amount, the said trustees shall immediately elect and declare the principal of all said bonds to be due and payable, and shall take proceedings to enforce payment of the principal of all said

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nant to any idea that only six years' interest is to be recovered on the coupons. These are in effect documents under seal—the bond under seal covenants for the payment of the coupons, and they partake of the nature of a specialty, and are good for at least 20 years: *The City v. Lamson* (1869), 9 Wall. 477, and *City of Lexington v. Butler* (1871), 14 Wall. 282, 297.

It would be incongruous to find that the coupons are statute-barred as to the realty part of the undertaking and yet exigible as to the personalty part. The security cannot be thus divided.

On this ground I am willing to affirm the Master's finding with costs to be paid to the respondent by the appellants.

bonds issued under these presents, and the interest unpaid thereon, as speedily as possible, instead of operating said railway and conducting the business thereof, as herein provided for in case of default being made in payment of interest.

E. B. B.



[BOYD, C.]

## FORBES v. GRIMSBY PUBLIC SCHOOL BOARD ET AL.

1903

Nov. 5.

*Public Schools—Purchase of Site and Erection of Building—Funds Provided by Council—Proceeds of Old Site and Building—Title to Land—Expropriation—Agreement with Tenant for Life.*

Although, as decided in *Smith v. Fort William Public School Board* (1893), 24 O.R. 366, public school trustees should not undertake for building purposes an outlay in excess of funds provided by the council, they are not restricted to the debentures voted by the council under sec. 76 of the Public Schools Act, 1901, but may also use other moneys they have under control in the shape of proceeds of the old school house and site, etc.

The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality.

An agreement for purchase and possession of a new site made by a school board with the tenant for life is one that controls the remaindermen under sec. 39 of the Act.

*Midland R.W. Co. v. Young* (1893), 22 S.C.R. 190, followed.

MOTION by the plaintiff, suing on behalf of himself and all other ratepayers of the village of Grimsby except the defendants, for an order continuing an injunction granted by a local Judge, restraining the defendant public school board from proceeding with the purchase of a site known as "the Kerr property" in the village of Grimsby, and from erecting a school building thereon; restraining the defendants the municipal corporation of the village of Grimsby from paying over to the public school board the sum of \$12,500 or any part thereof for such purpose; restraining the defendant Richard Lipsit, his servants or workmen, from proceeding with any work in connection with his contract with the school board for the erection of a building; and restraining the defendant Van Dyke, as chairman of the building committee of the school board, from authorizing any further work in connection with the contract for the erection of the school building.

On the 14th September, 1903, the public school board applied to the municipal council of the village for funds for the purchase of a site and the erection of a school house thereon. The application was not in writing. The school board prepared a draft by-law, and the council passed a by-law, in the form prepared, providing for the issue of debentures to the amount

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of \$12,500 for the purchase of a site and the erection of a building. After the passing of the by-law the public school board entered into a contract for the purchase of the "Kerr property" at \$1,300, and into a contract with the defendant Lipsit for the necessary work of a building at \$6,393, and with other persons for carpenter work, iron and slating, painting and glazing, \$4,885; in all \$12,578. These contracts did not include levelling, fencing, outbuildings, seating, heating, ventilating, equipment, architect's fees, or incidental expenses. The plaintiff estimated that these would cost from \$2,800 to \$3,000. The defendants put them at \$1,500. The property had not been conveyed to the school board, nor had they taken steps to expropriate it, but they had an agreement with the widow of John Kerr, who had a life estate in the land under his will, with remainder to her children. Work had been begun under the contract when the plaintiff obtained the injunction.

The defendants alleged that they intended to meet the additional expenditure by the price which they would obtain for the old school site and building and a frame house on the new site. They estimated these assets at \$1,700. The plaintiff alleged that they would not bring more than \$1,100. At the time of the application to the council nothing was said about the money to be so obtained, and the plaintiff alleged that if these assets had been mentioned the council would not have granted so large a sum as \$12,500.

The defendants stated that the contracts they had entered into were of a "sliding" character, and that they intended to keep within their available means.

The defendants also stated that the debentures were worth par, and that they would thus have at their disposal \$14,200, and that they would keep within that sum.

There was evidence before the local Judge that the only offer made for the purchase of the debentures was at 88, but upon the motion to continue an affidavit was filed to shew that a subsequent offer of \$12,375 had been received, but not considered because of the injunction.

The motion to continue was heard by BOYD, C., in the Weekly Court, on the 3rd November, 1903.

*A. H. Marsh*, K.C., and *C. H. Pettit*, for the plaintiff. The amount which the school board have contracted to pay exceeds the par value of the debentures. The application and the by-law indicate that the total expenditure was to be \$12,500. The estimates should be submitted to the council, and the council should take care not to leave it in the power of the board to exceed their estimate: *London Board of Education v. City of London* (1901), 1 O.L.R. 284. The board cannot contract for an expenditure beyond the value of the debentures: *Smith v. Fort William School Board* (1893), 24 O.R. 366. The defendants cannot include the old assets. The board are going on to build without any title. One of the Kerr remaindermen is dead, leaving infant children. Private trustees would be restrained from committing such a breach of trust.

*G. Lynch-Staunton*, K.C., for the defendants. The board will not exceed the amount at their disposal. They have a right to apply the proceeds of the sale of the old site and building upon the new site. The board have the right to expropriate the site, but can agree with the tenant for life: see sec. 39 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.)

November 5. BOYD, C.:—Upon the materials before me I do not think the injunction should be continued.

*Smith v. Fort William School Board*, 24 O.R. 366, 372, decides that school trustees should not undertake to build in excess of funds provided by the council, and that is a salutary rule which need not be invaded in the present case.

I do not think the school board is restricted to the debentures voted by the council under sec. 76 of the Public Schools Act, 1901, but may also turn in the other moneys they have under control in the shape of rent and the proceeds of the old school house and site.

By the figures now submitted there is a considerable margin between the contemplated outlay as tendered for and the funds available under the contract or in the hands of the defendants. It does not appear to be necessary to exceed what is thus provided, and the defendants swear they will keep the work within what they have means to pay for. The Court should not

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lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality.

As to the other objection that there is not a good title to the new site: I do not think it should prevail. There is power to expropriate, and, apart from that, the agreement for sale and possession has been made with the tenant for life, and that is one that controls the remaindermen under the provisions of the Public Schools Act, sec. 39\*: *Midland R.W. Co. v. Young* (1893), 22 S.C.R. 190.

The injunction is dissolved and costs reserved till the hearing or further order.

\*39.—(1) All corporations and persons whatsoever, tenants in tail or for life, guardians, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those they represent, whether infants, issue unborn, lunatics, idiots, femmes-coverts, or other person, seised, possessed of or interested in any land, may contract for, sell or convey all or any part thereof to school trustees for a school site . . . ; and any contract, agreement, sale, conveyance and assurance so made shall be valid and effectual to all intents and purposes whatsoever; and the corporations or persons so conveying are hereby indemnified for what they respectively do by virtue of or in pursuance of this Act.

E. B. B.



[IN CHAMBERS.]

RE OLIVER AND BAY OF QUINTE R.W. Co.

1903

Nov. 9.

*Costs—Railway—Expropriation of Land—Abandonment.*

The word "desist" in C.S.C. ch. 66, sec. 11, sub-sec. 6, has the same meaning as "abandon" in 51 Vict. ch. 29, sec. 158 (D.), i.e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the landowner.

*Widder v. Buffalo and Lake Huron R. W. Co.* (1865), 24 U.C.R. 222, 234, applied and followed.

MOTION by the owner of the equity of redemption and the mortgagee of certain land for an order for taxation and payment of the costs of the applicants incurred in consequence of a notice of expropriation of the land given by the railway company and subsequently abandoned, as the applicants alleged.

The land mentioned in the notice exceeded the quantity allowed by the Railway Act, 51 Vict. ch. 29, sec. 103 (D.), to be taken without the consent of the owner, and the railway company were restrained by injunction from proceeding upon the notice. They subsequently gave a new notice for a smaller quantity of land.

Section 158 of the Act provides: "In any case where the notice given improperly describes the land or material intended to be taken, or if the company decides not to take the land or material mentioned in the notice, it may abandon the notice and all proceedings thereunder, but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment—such costs to be taxed in the same manner as costs after an award; and the company may give to the same or any other person notice for other land or material otherwise described, notwithstanding the abandonment of the former notice."

By sec. 154 the costs "may be taxed by the Judge." By sec. 2 (i) the expression "Judge" means a Judge of a Superior Court.

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The motion was heard by BOYD, C., in Chambers, on the 6th November, 1903.

A. H. Marsh, K.C., for the applicants, contended that the company had desisted or abandoned, that the service of a new notice operates as an abandonment, citing *Canadian Pacific R.W. Co. v. Little Seminary of Ste. Thérèse* (1889), 16 S.C.R. 606; *Re Hooper and Erie and Huron R.W. Co.* (1888), 12 P.R. 408; *Widder v. Buffalo and Lake Huron R.W. Co.* (1865), 24 U.C.R. 222, at p. 234. He also pointed out that the practice was for "the Judge" to make an order referring the taxation of the costs to an officer of the Court, and upon his report to make a further order for payment of the costs in question and of the costs of the application, orders, and reference: *Re McRae and Ontario and Quebec R.W. Co.* (1887), 12 P.R. 282, 327; *Re Bronson and Canada Atlantic R.W. Co.* (1890), 13 P.R. 440.

W. E. Middleton, for the company, contended that the company had not abandoned their notice within the meaning of the statute, their action not being voluntary.

November 9. BOYD, C.:—This application is governed by the decision in *Widder v. Buffalo and Lake Huron R.W. Co.*, 24 U.C.R. at p. 234, which, though with reference to the earlier Railway Act, is pertinent to the present Act, which contains substantially the same provision. That is, C.S.C. ch. 66, sec. 11, sub-sec. 16, is *in pari materia* with 51 Vict. ch. 29, sec. 158 (D.) The marginal note as to both is the same, and well expresses the meaning of both, "company may desist on payment of costs." In the text the earlier statute uses "desist," the later "abandon;" but by the dictionaries these words have a common meaning, *i.e.*, to leave off or discontinue. Whether voluntarily or compulsorily makes no matter; if the company ceases operations to expropriate land, and gives a new notice as to other operations, that is desistment or abandonment, which involves the company in paying costs to the landowners.

Refer the costs for taxation to the taxing officer, with costs of application to be paid by the company.

[IN CHAMBERS.]

TAYLOR v. TAYLOR.

1903

Nov. 9.

*Writ of Summons—Substitutional Service—Motion to Set aside—Status of Applicant—Solicitor.*

Where a solicitor who was served with the writ of summons for the defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service :—

*Held*, that he had no *locus standi*.

The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.

*Semble*, that if the solicitor were not acting for or in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent.

Decision of the Master in Chambers, *ante* 356, affirmed on different grounds.

APPEAL by a solicitor who was served substitutionally for the defendant with a writ of summons, from an order of the Master in Chambers (*ante* 356) dismissing the appellant's application to set aside the order for substitutional service and the service upon the appellant, upon the ground that the appellant had no status to apply.

The appeal was heard by BOYD, C., in Chambers, on the 6th November, 1903.

*W. J. Elliott*, for the appellant.

*H. D. Gamble*, for the plaintiff.

November 9. BOYD, C.:—In this case the solicitor might have contented himself with sending back the copy of the writ served and calling attention to the fact that he was not acting for or in communication with the defendant, as was done in *Watt v. Barnett* (1878), 3 Q.B.D. 183; or he might have moved as an officer of the Court to advise the Court that an error had been committed in ordering service upon him as the defendant's solicitor, as was done in *The Pommerania* (1879), 4 P.D. 195. And, even if not an officer of the Court, I think it is competent for a person served as agent of a defendant to move the Court to set aside the service if he is not an agent: *Doremus v. Kennedy* (1851), 2 Gr. 657.

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But here the motion is by the solicitor acting for the defendant; he swears that he applies on the defendant's behalf, and the motion is made "on behalf of the above defendant." He, as solicitor acting for the defendant, has no *locus standi*, because that implies that he is in communication with the defendant, and has the right, or has been instructed, to represent him. Instead of applying as *amicus curiæ*, he applies as agent of the defendant. The Court will not set aside substitutional service if it appears, or can fairly be inferred, that the defendant had notice of what was going on. Such notice is here to be inferred from the form of the application and of the affidavits, as well as from the fact that a person called Taylor was making some inquiries about this motion during its pendency.

Altogether, I think it best to affirm the Master's conclusion not to disturb the order for substitutional service, and let the plaintiff proceed at his own risk.

No costs of this application or appeal to either party.

E. B. B.

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[BOYD, C.]

CHITTICK V. LOWERY ET AL.

1903

Nov. 9.

*Execution—Fi. fa. Lands—Sale of Equity of Redemption—Purchase by Execution Creditor — Subsequent Conveyance to Debtor — Covenants—Incumbrances—Release.*

Under a writ of *fi. fa.* against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at that time the assignee of the judgment upon which the *fi. fa.* was founded. After holding the interest acquired by his purchase for a year, he sold it to the mortgagor, and made to him the usual short form conveyance under R.S.O. 1897, ch. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and thereafter an *alias* writ of *fi. fa.* lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage:—

*Held*, that the land was not affected by the judgment and execution while the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the *fi. fa.*; and the statutory covenants, No. 4 as to incumbrances, and No. 8 as to the release of all claims, contained in the conveyance by the purchaser to the mortgagor, did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance.

APPEAL by one Stovel, made a party in the Master's office to an action on a mortgage, from the report of the local Master at Barrie disallowing the claim of the appellant as a subsequent incumbrancer by virtue of an assignment of a judgment against the mortgagor and a *fi. fa.* lands in the sheriff's hands. The facts appear in the judgment.

The appeal was heard by BOYD, C., in the Weekly Court, on the 4th November, 1903.

*J. Bicknell*, K.C., for the appellant.

*C. E. Hewson*, K.C., for the defendant Lowery, the mortgagor, and for subsequent mortgagees, also made parties in the Master's office.

*D. L. McCarthy*, for the plaintiff.

November 9. BOYD, C.:—Under an execution in the case of *Hawthorn v. Lowery*, the sheriff sold the equity of redemption of Lowery in the lands mortgaged, on the 14th August, 1896

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and a conveyance thereof was made by the sheriff to the purchaser, McGibbon, on the 25th August, 1896, for \$100. McGibbon was then the assignee of the judgment, and as purchaser he held this interest in the land till the 23rd September, 1897, when he sold it to Lowery, the mortgagor, for \$50, and made to him the usual short form of conveyance under R.S.O. 1897, ch. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on the 2nd August, 1899, but was not then renewed. McGibbon made an assignment of the judgment (so paid in part) on the 22nd April, 1902, to Stovel, and thereafter an *alias* writ of *fi. fa.* lands was issued on the 3rd July, 1902, and placed in the hands of the sheriff, and in respect of this execution Hawthorn and Stovel were made parties in the Master's office as subsequent incumbrancers.

The Master, however, afterwards, upon hearing all parties, discharged them as subsequent incumbrances, on the ground that the release of all claims in the short form deed from McGibbon to Lowery operated to discharge the land from this judgment and execution.

When the equity of redemption was sold and conveyed by the sheriff, the judgment was satisfied *pro tanto*, and the equitable interest in the mortgaged premises became vested in the execution and judgment creditor as owner. The land was no longer affected by that judgment and execution, as it had passed from the ownership of the mortgagor to that of the creditor. So matters remained till the sale and conveyance of McGibbon to the mortgagor Lowery, a year afterwards. The effect of this was to invest the mortgagor with a new interest in the land as conveyed to him by the sheriff's purchaser. That new interest (apart from the covenants of the short form deed) would fall under the operation of the writ against lands, which was still in the sheriff's hands till August, 1899. On the non-renewal of the writ, the equitable estate held by Lowery would be exempt from the execution, till there was placed in the sheriff's hands the *alias* writ of 1902, as to the effect of which the contest arises.

The covenants relied upon are, No. 4 as to incumbrances, and No. 8 as to the release of all claims. Now, when the land

was in the hands of McGibbon, it was not subject to any incumbrances by reason of this judgment and execution. It did become subject to the execution issued by or for Stovel in 1902, which would rank in priority only from that date. There was nothing affecting the land in the mere judgment till execution against lands issued thereon. The writ left in the sheriff's hands till 1899 was spent by non-renewal, and may be left out of the case. All claims possessed by McGibbon on the equitable estate were conveyed by him when he made the conveyance. It was not till after the conveyance to the mortgagor that this claim under the execution became possible; and then the claim arises by operation of law, for the satisfaction of a judgment debt (still unpaid by Lowery) out of the new estate acquired by him from the sheriff's purchaser.

I do not read the expansion of No. 4 as embracing a judgment or execution obtained or issued by the grantor, but rather one which affects the lands in contravention of his absolute ownership, *i.e.*, one issued or enforceable against the lands in his hands, and one which, as against his vendee, he ought to pay.

As to the unique provision No. 8, it has its origin in the abortive legislation of Lord Brougham in the English Short Forms Act of 1845 (8 & 9 Vict. ch. 119, Imp.), which, after remaining in disuse for many years, was finally repealed in 1881 by sec. 71 of the Conveyancing Act of that year. It is not commented on in the books, and there have been, I believe, no cases on the provision for the "release of all claims on the lands," either in England or in this country, where it was introduced in 1846 (9 Vict. ch. 6 (C.)). But I take it not to be applicable to this transaction. The protection afforded by the release clause is as against all claims which the purchaser would not have to pay or meet but for his ownership of the land. The clause applies to claims on the land which it is and was the duty of the vendor to remove in order to assure the purchaser a complete title at the date of conveyance. But such title was conveyed to the purchaser by the vendor. There was nothing outstanding which affected or could or might affect the lands, or the purchaser in respect of the lands, as and when the conveyance was made to the purchaser, in respect of the unsatisfied judgment and possible execution upon it; but it was the duty

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of the purchaser to pay that judgment, and it was not part of the bargain that the vendor was to discharge his claims in respect of that unpaid judgment—nor does the general release extend to it. It would be a misuser of the release clause, were the purchaser to be thereby absolved from paying the balance due on the judgment, and, if he is not free from the incidence of the judgment, why should the land be freed from the effect of an execution issued upon that judgment in regard to the newly acquired estate? The judgment is the principle thing, and the execution is its accessory and legal incident.

All claims of the vendor as to the land have been conveyed and released to the purchaser; what has not been released is his claim upon the unsatisfied judgment: *Barrow v. Gray* (1597), Cro. Eliz. 551.

There may be some matter of form as to who is entitled to the judgment owing to death or transmission of interest, but that is a matter amendable on proper application. At present, I think the Master should not have expunged the execution in the sheriff's hands lodged prior to the second mortgage, but should have reported it as an existing incumbrance with the proper priority. The costs of appeal and motion should be added to the security.

E. B. B.



[IN CHAMBERS.]

## RE CLARKE, TORONTO GENERAL TRUSTS CORPORATION V. CLARKE.

1903

Nov. 14.

*Trusts and Trustees—Investments—Realization—Tenants for Life—Remaindermen—Apportionment—Election—Rate of Interest.*

A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue after payment of debts, etc., should be divided equally among her four children, three daughters and one son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the trustees under which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease, renewable. When the lease expired in 1893 it was renewed for 21 years at \$1,850 a year. The lessee made default in 1894, and the trustees took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In November, 1902, a sale was effected for \$47,500:—

*Held*, following *In re Cameron* (1901), 2 O.L.R. 756, that the life tenants were entitled to some portion of this sum.

But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants then, in effect, elected to treat this property as a satisfactory investment.

The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest.

*Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107, followed.

An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced \$47,500 on the 15th November, 1902, interest being calculated at  $4\frac{1}{2}$  per cent. per annum with half-yearly rests, and credit being given for the sums actually received by the life tenants from the rents accruing during that period.

MOTION by the Toronto General Trusts Corporation, trustees under the will of Hannah Maria Clarke and under a settlement made by John S. W. Clarke in 1887, for an order and direction as to whether or not any portion (and, if any, what portion) of the purchase price of certain lands included in the trusts was payable to Catharine Alice Clarke and others, the life tenants, under the circumstances mentioned in the judgment, where the facts and arguments are stated.

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RE CLARKE.

The motion was heard by MACLAREN, J.A., sitting in Chambers for a Judge of the High Court, on the 16th October, 1903.

*A. Fasken*, for the trustees.

*W. R. Riddell*, K.C., for the life tenants.

*F. W. Harcourt*, for the infant remaindermen.

The following cases, in addition to those mentioned in the judgment, were referred to by counsel: *Re Plumb* (1896), 27 O.R. 601; *In re Bird*, [1901] 1 Ch. 916; *In re Alston*, *Alston v. Houston*, [1901] 2 Ch. 584; *In re Hengler*, *Frowde v. Hengler*, [1893] 1 Ch. 586; *Londesborough v. Somerville* (1854), 19 Beav. 295; *Wright v. Lambert* (1877), 6 Ch. D. 649; *In re Grabowski's Settlement* (1868), L.R. 6 Eq. 12; *In re Goodenough*, [1895] 2 Ch. 537; *In re Morley*, *Morley v. Haig*, *ib.* 738; *Ackroyd v. Ackroyd* (1874), L.R. 18 Eq. 313.

November 14. MACLAREN, J.A. :—The Trusts Corporation, who are trustees under the will of the late Mrs. H. M. Clarke and under a settlement by one of the defendants, move for an order and direction as to whether any portion, and if so what portion, of the purchase price of the premises, 40, 42, and 44 King street east, Toronto, is payable to the defendants as life tenants under her will.

Mrs. Clarke died on the 6th November, 1878, leaving a will whereby she bequeathed all her real and personal estate to three executors in trust to sell and convert the same into money, which was to be invested by them. After providing for the payment of debts, the education and maintenance of her three daughters and one son, during their minority, and the payment of a legacy of \$5,000, she directed the residue to be divided equally between her four children. The share of each daughter was to be held in trust by the same trustees, or by others to be named by the daughter, she to receive the income for life, and her children the capital after her death; the son to receive his one-fourth share absolutely on coming of age.

On the 1st July, 1887, after all the children had attained their majority, a deed of partition was made. The investments, which consisted of mortgages and bonds and also certain stocks held by the trustees, and the cash in their hands, were divided

into four equal parts. The trustees also held the real estate now in question, in addition to certain premises in King street west, both of which had belonged to the testatrix. In the deed an undivided fourth of this property was allotted to each of the children, each share being valued at \$4,000. The former property was subject to a lease for 42 years, renewable, to expire on the 1st May, 1893, the rental being £154 per annum. The children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the same trustees, they to hold his share in trust for him during his life, remainder to his children.

On the 30th November, 1889, the Toronto General Trusts Company, with the consent of all parties, were appointed in all these trusts in the room of the original trustees.

The lease of the property in King street east on its expiry was renewed for a term of 21 years at a rental of \$1,850 per annum. The lessee paid the rent for a year, but defaulted in May, 1894, and made an assignment for the benefit of creditors. The Trusts Company took possession of the lands and buildings, but for a number of years, on account of the prevailing depression in the value of real estate, were unable to obtain an adequate rental or make a sale. The lessee and his assignee made over to the company all their rights in the lands and buildings. Finally, in November, 1902, a sale was effected for \$47,500.

The defendants now claim that as tenants for life they are entitled to a portion of the purchase price, for the reason that such a large price was obtained only by a long delay in selling, during which time they obtained a very precarious and inadequate income, and that the sum of \$47,500 is made up in considerable part of accumulated income, and of the amount by which the buildings obtained by the default in payment of their rent, went to make up the purchase price, which is shewn to be \$6,000. It was urged on their behalf that the rule laid down in *Wilkinson v. Duncan* (1857), 28 Beav. 469; *Beavan v. Beavan* (1869), 24 Ch. D. 649 note; *In re Earl of Chesterfield's Trusts* (1883), *ib.* 643; *In re Hobson*, *Walker v. Appach* (1885), 55 L.J., Ch. 422; and *In re Flower*, *Matheson v. Goodwin* (1890), 62 L.T. 216; should be followed. It is said by

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Cozens-Hardy, J., in *In re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779, that this rule has never been applied in England, except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession. Here it is not residuary personal estate, but real estate, to be converted, it is true, into money. In this Province, however, the rule has been lately applied where, as here, real estate was to be converted into money and invested, and where it formed no part of the residue. See *In re Cameron* (1901), 2 O.L.R. 756.

The life tenants claim that in the present case we should go back to the date of the death, or at the latest to one year after that date, and ascertain what sum then invested at 6 per cent. up to 7th July, 1900, and at 5 per cent. since that time, with half-yearly rests, and giving credit for the income actually received by the life tenants, would have produced the purchase price of \$47,500 in November, 1902. They say that such sum would be capital, and the difference between that amount and the \$47,500 should be paid to them as deferred income.

I am unable to see that this is a correct application of the rule to the present case. The deed of partition of the 1st July, 1887, and the acceptance by each of the life tenants of an undivided fourth of the real estate as capital, the ratification of the acts of the trustees, and the appointment by them of these trustees to the new separate trusts, in my opinion preclude them from going back beyond that date. It was in effect an election on their part to treat this as a satisfactory investment, and they cannot say that the property was unproductive. There is no evidence or suggestion that during the currency of the first lease, or while the lessee paid the rent payable under the new one, any sale of the lands was attempted or suggested, or even desired by any of them, and there is no evidence that they would have received more if the property had been sold and the proceeds invested as directed by the will.

I am of opinion, however, that the default of the lessee in 1894, the fact of the property remaining largely unproductive until 1902, the impossibility of making an advantageous sale before that time, and the fact that the price then obtained was in a considerable part at the expense of the life tenants, raises



different considerations, and that I am bound to follow *In re Cameron*, and apply the principles there laid down.

As to the rate of interest, I do not think that the Interest Act, R.S.C. 1886, ch. 127, applies. The rule to be followed is that laid down by the Court of Appeal in England in the case of *Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107. Lord Lindley there says, p. 118, that it is to be determined by the rate of interest which can be obtained on securities upon which trustees may invest, and it was fixed at 3 per cent. instead of at 4, the rate formerly fixed in England. I think  $4\frac{1}{2}$  per cent. net would be a fair rate here.

There will, therefore, be a reference to Neil McLean, official referee, to determine what sum invested on the 1st May, 1894, would have produced the sum of \$47,500 on the 15th day of November, 1902, interest being calculated at the rate of  $4\frac{1}{2}$  per cent. per annum with half-yearly rests, and credit being given for the sums actually received by the defendants from the rents accruing during that period. Costs and further directions reserved.

E. B. B.

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## [IN THE COURT OF APPEAL.]

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Nov. 16.

## RE McDONALD AND TOWN OF LISTOWEL.

*Registry Laws—Amendment of Registered Plan—Petition to County Court Judge—Jurisdiction of Judge of Another County—Local Courts Act—Evidence on Petition—Affidavits—Merits—Order Refusing to Re-open—Appeal.*

A petition under sec. 110 of the Registry Act, R.S.O. 1897, ch. 136, for an order amending a plan of land in a town by closing part of a street allowance, presented to the Judge of the county court of the county in which the land lay, was at his request heard and adjudicated upon by the Judge of another county :—

*Held*, that the Judge of another county court has jurisdiction, upon the request of the Judge of the county court of the county in which the land lies, to hear and adjudicate upon such a petition. To hear such a petition is one of the judicial duties to be performed by the Judge of a county court in any case where application is made to him instead of to a Judge of the High Court; and secs. 16 and 18 of the Local Courts Act, R.S.O. 1897, ch. 54, apply.

2. Although the application to amend the plan is by petition and is therefore interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, be given *viva voce*. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition.
3. Upon the merits the order of the Judge amending the plan was justified, the portion of the street in question never having been opened or used as a highway, and the lands abutting on both sides being owned by the petitioner.
4. No appeal lay to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence.

Order of Judge of county court of Oxford affirmed.

AN appeal by Samuel L. Kidd (under the Registry Act, R.S.O. 1897, ch. 136, sec. 110\*), from an order of the Judge of the county court of Oxford (sitting for the Judge of the county court of Perth) directing the closing up of McDonald street in the town of Listowel, and from a subsequent order of the same Judge dismissing an application by the appellant for leave to

\*110. In no case shall any plan or survey, although filed and registered, be binding on the person so filing or registering the same, or upon any other person, unless a sale has been made according to such plan or survey, and in all cases amendments or alterations of any such plan or survey may be ordered to be made, at the instance of the person filing or registering the same or his assigns, by the High Court, or by a Judge of the said Court, or by the Judge of the county court of the county in which the lands lie, if on application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient. An appeal shall lie from any such order to the Court of Appeal.

adduce further evidence. The facts and arguments are stated in the judgment.

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The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 24th and 25th September, 1903.

*D. L. McCarthy*, for the appellant.

*W. M. Douglas*, K.C., for J. H. McDonald, the respondent.

November 16. The judgment of the Court was delivered by Moss, C.J.O.:—In the month of June, 1902, John Hamilton McDonald, the respondent in this appeal, applied by petition to the county Judge of the county of Perth, under the provisions of sec. 110 of the Registry Act, R.S.O. 1897, ch. 136, for an order altering or amending a certain plan of part of farm lot 23, formerly in the 10th concession of the township of Wallace, but now within the town of Listowel, by closing a part of the allowance for street called McDonald street on the plan.

The petition set forth that the petitioner was the owner of part of park lots 6 and 7 as shewn on the plan, deriving title thereto by conveyance dated the 6th January, 1893, from one John C. Hay, who derived title thereto from one William G. Hay, for whom the survey and plan were made, and by whom the plan was registered in the registry office on the 11th July, 1878.

The petition further set forth that the plan shewed an allowance for a street called McDonald street, running easterly from Wallace street on the west to Walton street on the east, passing through park lots 6 and 7; that the portions of said park lots lie on either side of the allowance for street; and that, in so far as it passes between park lots 6 and 7 and the portions thereof owned by the petitioner, it had never been assumed by the corporation of the town for public use, nor opened for travel; but ever since the year 1880 the petitioner and his predecessors in title had the said allowance fenced in as part of their property.

The petition also set forth that the petitioner had obtained from the executors of W. G. Hay a quit claim deed covering the said allowance for street, and that the petitioner had

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devoted a part of park lot 7 for cemetery purposes, which had become, in fact, the public cemetery of the town; that many of the townspeople were desirous of preserving the whole property for cemetery purposes, and that all the owners of lots abutting on McDonald street to the west of the park lots, except one, had consented to the alteration of the plan, and that one, while unwilling to sign a consent, was not opposed to the application.

The learned county Judge appointed the 3rd July, 1902, and directed service of his appointment to be made on all parties concerned. The hearing was adjourned from time to time until the 28th November, 1902. On that day the matter was proceeded with before His Honour Alexander Finkle, Judge of the county court of Oxford, sitting for and at the request of the Judge of the county court of Perth.

Counsel for Samuel L. Kidd, the present appellant, objected that the Judge of the county court of Oxford had no jurisdiction to try the matter, because sec. 110 of the Registry Act enabled no county Judge except the Judge of the county in which the lands lie to entertain or dispose of the application.

The objection was overruled, and the hearing was proceeded with. The petitioner then supported his petition by the *viva voce* evidence of himself and witnesses called on his behalf. At the close of his case Mr. Kidd testified on his own behalf, and his counsel then tendered in evidence the affidavits of George A. Wattie, Walter A. McCarney, and John A. Askin. Counsel for the petitioner objected, and the learned Judge refused to receive them. No application was made for an adjournment in order to procure the attendance of the deponents, and the case was argued on the merits. Subsequently the learned Judge gave judgment in favour of the petitioners, and pronounced an order for the amendment of the plan as prayed.

On the 30th January, 1903, an application on behalf of Mr. Kidd was made to His Honour Judge Finkle to open up the proceedings, and for leave to adduce further and additional evidence. The application was opposed and after argument was dismissed, the learned Judge holding that after he had pronounced judgment and made an order he had no power to act further in the matter, and that the applicant's only remedy was



by appeal from the judgment. He further intimated that in any case he would not grant the application.

The appeal is from both orders.

On the opening of the appeal, counsel for the respondent objected that no appeal lay from the latter order, and he moved to quash that part of it. The appeal was allowed to proceed subject to the objection.

The points pressed by Mr. D. L. McCarthy, who supported the appeal, were: (1) that the learned county Judge acted without jurisdiction; (2) that he ought to have received the affidavit evidence; (3) that on the merits he should have refused to amend the plan; (4) that he should have allowed the motion to open up the proceedings.

On the question of jurisdiction the argument was, that under sec. 110 of the Registry Act the county Judge does not act for the court or judicially, but merely as *persona designata*, and that he could not empower any other Judge to take his place. But the language of sec. 110 does not support this contention. The power given is to be exercised by the High Court or a Judge thereof, or the Judge of the county in which the lands lie. A Judge of the High Court, acting under the section, would clearly be representing the Court. His acts would be acts of the Court, and therefore what he would do would be done in his judicial capacity. And it would be a strange anomaly if the Judge of a county court should be deemed to be acting in a different capacity. He is performing the duty of a Judge equally with a Judge of the High Court under similar circumstances. In *In re Waldie and Village of Burlington* (1886), 13 A.R. 104, the question of the capacity in which a county Judge acted under this section came up under somewhat different circumstances. At that time the section did not provide, as it now does, for an appeal to this Court from an order made under it, and objection was made that no appeal lay, because, as was urged, the Judge of the county court in making an order did not act judicially or *quâ* Judge, but was only *persona designata*. It did not become necessary to expressly decide the point whether or not an appeal lay, but Osler, J.A., by whom the judgment of the Court was delivered, expressed the opinion that under the section the Judge of the

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county in which the land lies has concurrent jurisdiction with the High Court and the Judges thereof to make the order. It is, therefore, one of the judicial duties to be performed by a Judge of the county court in any case where application is made to him instead of to the High Court or a Judge thereof. By sec. 16 of the Local Courts Act, R.S.O. 1897, ch. 54, the Judge in any county may, if he sees fit, perform any judicial duties in any county other than his own, on being requested to do so by the Judge to whom the duty for any reason belongs.

This language fully covers the case. By force of it the Judge of the county court of Oxford, having seen fit to comply with the request of the Judge of the county of Perth to perform the duty belonging to the latter under sec. 110, was put in the latter's place for the purposes of the application. Being so placed, sec. 18 of the Local Courts Act also applies to him and the duties he may perform.

With regard to the nature of the evidence to be received on the hearing of the petition, it is important to bear in mind the nature and effect of the order sought for under sec. 110. Subject to appeal, the order to be made finally and conclusively settles the rights of the parties concerned. Though the application may be brought before the Court or Judge on petition, and is therefore interlocutory in form, the form of the application does not settle the mode in which the evidence is to be taken. To quote from the judgment of Cotton, L.J., in *Gilbert v. Endean* (1878), 9 Ch. D. 259, at p. 269: "Now many of the cases which are brought before the Court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the Court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause."

In *Attorney-General v. Metropolitan District R. W. Co.* (1880), 5 Ex. D. 218, a question arose as to the propriety of ordering the evidence to be taken *viva voce* at the hearing, instead of by affidavits under the Equity Exchequer Rules of 1866, and the Court of Appeal held, reversing the Exchequer

Division, that the case was one in which the evidence should be taken orally. Sir George Jessel, M.R. said (p. 224) that when the rule in question was made, the practice in the Court of Chancery and on the Equity side of the Court of Exchequer was not to take evidence *vivâ voce*, unless in certain exceptional cases; but since the passing of the Judicature Act, the Court could always take evidence *vivâ voce*. After discussing the effect of the Act upon the former practice, he said: "It appears to me that, having regard to the present state of the law with regard to evidence, the Judge should in every case of contested or disputed fact coming on to be tried take the evidence orally, unless some good reason to the contrary is shewn." Cotton, L.J., pointed out the principle which under the rule there in question should guide or determine whether the evidence should be by affidavits or *vivâ voce*, as follows (p. 226): "Affidavit evidence should *primâ facie* be given in all those cases in which there is no real conflict of fact, and where no explanation of facts is necessary in order to enable the Court to come to a decision; that is to say, where, though the parties do not admit the facts alleged on the one side or on the other, and it is therefore necessary that the Court should have the statements verified by something beyond the mere allegation of the parties, there is no conflict of evidence. But, in my opinion, evidence should be taken orally in other cases besides those to which the Judges of the Exchequer Division refer, and in such a case as this, where it is desirable to have not only mere verification of statements, but explanation, so as to enable the Court properly to understand what it is on which either party relies, the evidence should, in my opinion, be given orally; because then you can test and examine what the witness means by asking him questions, and this you cannot do if his evidence is put into an affidavit settled by his solicitor or counsel, and comes out, not as the statement of the witness of what he knows and what he desires to express as the fact, but as the view which his solicitor or counsel takes of those statements which are made to him."

In applications under sec. 110 cases may arise in which the Judge might fairly consider it not improper to receive and act upon affidavit evidence, and he might certainly do so upon agreement between the parties, but in the absence of agree-

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ment the prevailing rule ought to be that when there are facts in dispute the witnesses should give their testimony *vivâ voce*. This is in harmony with the practice under the Judicature Act and the Con. Rules, except in regard to matters distinctly interlocutory in their nature. See Rules 483, 484, 485, *et seq.* And as a means of eliciting the truth it is much more satisfactory. In this case the investigation was proceeded with on testimony given *vivâ voce*, and it cannot be said that the learned Judge erred in giving effect to the objection to the reception of affidavits when tendered in answer to the petitioner's case. If he had permitted them to be read, the deponents would have been subject to cross-examination, and neither time nor expense would have been saved. There is, therefore, no ground for interfering with his ruling.

Upon the merits the petitioner established sufficient grounds to justify the order made. The portion of the street in question, though delineated on the plan filed in 1878, was never opened or used as a street or highway. The lands abutting on both sides are owned by the petitioner. There was no opposition by the owners of lots abutting the portion to the west, and Gladstone street—a travelled highway—intervenes between the portion in front of their lots and the portion proposed to be closed; so that they are not cut off from access to the nearest highway.

The appellant Kidd is not an owner of any lot shewn on the plan, and he can only be said to be a party concerned, if at all, by reason of the existence of the bond said to have been given by W. C. Hay to Walton, from whom Kidd purchased his land, which lies to the east of Walton street altogether, and outside of the plan. No proper proof was given of the existence or contents of the alleged bond. While the existence of an agreement by Hay to open up the street for the benefit of the owners of the Walton property, if proved, might very properly have some influence on the learned Judge in exercising his discretion whether he would or would not order the plan to be amended, the fact would not be conclusive. The petitioner was not affected with notice, and it cannot be said that the learned Judge was wrong upon the evidence before him.



As to the motion to open the proceedings and receive further evidence, the learned Judge rightly dealt with it. In any case there could be no appeal from his decision on the motion. The appeal to this Court under sec. 110 is from the order made upon the hearing of the application to amend the plan. This does not include every order made in the course of the proceedings—and more especially should it not apply to an order made after the application was disposed of.

The appeal must be dismissed.

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Nov. 21.

*Assignments and Preferences Act—Motion to Remove Assignee for Benefit of Creditors—Notice of Motion—Grounds—Evidence—Proposed Examination of Assignee—Judicature Act and Rules.*

Where a summary motion is made under sec. 8 (1) of the Assignments and Preferences Act, R.S.O. 1897, ch. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application. The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it.

MOTION by creditors for an order removing the assignee for the benefit of creditors of George Wilson & Co., insolvents, and appointing another or an additional assignee, and motion by the same applicants to commit the assignee for refusal to attend for examination upon the pending motion to remove him.

The motion was heard by OSLER, J.A., sitting in Chambers for a Judge of the High Court, on the 13th November, 1903.

*A. C. McMaster*, for the applicants.

*D. L. McCarthy*, for the assignee.

November 21. OSLER, J.A.:—Section 8 (1) of the Assignments and Preferences Act, R.S.O. 1897, ch. 147, provides that “an assignee may be removed, and another substituted or an additional assignee appointed, by a Judge of the High Court, or of the county court where the assignment is registered.”

The method of procedure under this clause is not prescribed by the Act, as it is in matters arising under secs. 34-39, nor is any provision made as to how the evidence is to be taken, whether *vivá voce* or by affidavit.

The notice states that in support of the motion will be read the examination of the assignee intended to be taken and the affidavit of one Le Vallée. No affidavit is filed or produced, and the examination of the assignee has not been taken. It appears that an appointment to examine him before the local officer at St. Catharines under Rule 491 was taken out and

served upon him; that he refused to attend, on the ground that the Rule did not apply to a proceeding of this nature, which is not in Court, and in which the Judge acts simply as *persona designata*; and that a motion to commit him for his default and contempt of the appointment is pending and now returnable.

The notice of motion states no ground for the removal of the assignee, and no reason has been suggested why he is no longer a fit and proper person to be assignee.

There are two grounds on which the main motion must be dismissed: (1) that no reason is stated in the notice why the assignee ought to be removed; and (2) that there are no materials of any kind before me to supply the omission. I think that in such a proceeding as this the assignee is entitled to know what is alleged against him as disqualification or other ground of removal, and that, however briefly and compendiously, it should be expressly stated in the notice. The motion ought not to be launched in the bald fashion here adopted, in the hope of fishing out of the assignee's examination something or other to support it.

The motion to commit must also be dismissed. There is nothing in the Assignments and Preferences Act or the Judicature Act or Rules which enables us to apply to the principal proceeding the procedure applicable in an action. That has been expressly done to a limited extent in matters arising under secs. 34, 37, and 39, but this only emphasizes the omission in the case of a proceeding under sec. 8 (1).

I do not doubt that the neglect or refusal of the assignee to comply with the order of the Judge to attend and be examined before him, or perhaps before some designated officer, for the purposes of that section, would probably result in his dismissal, even if it involved no other penalty. But he is not obliged to attend the appointment of an officer who had no authority to issue it.

Motions dismissed with costs.

*Re Young* (1891), 14 P.R. 303, may be noted.

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## [IN CHAMBERS.]

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ATKINSON ET AL. V. PLIMPTON ET AL.

Oct. 7.  
Oct. 27.

*Writ of Summons—Service out of Jurisdiction—Sale of Goods—Breach of Contract—Place of Performance—Property Passing—Order for Service—Affidavit—Non-disclosure—Discretion as to Forum.*

The defendants lived in England. One of them, being in Ontario, saw the plaintiffs, who lived in Ontario, and it was agreed that the plaintiffs should send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, *via* Leyland Line from Boston, delivered f.o.b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the goods shipped in the same way. Before this order was filled the defendants were sued in England for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned:—

*Held*, that the property in the goods passed to the purchasers on the delivery on board the vessel at Boston, and that an action would thereupon lie in Ontario, which was the place for payment, for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in case of sale by sample, *prima facie* the place of delivery is the place of inspection, and there was nothing in the contract to rebut the presumption.

Therefore the action came within Rule 162 (1) (e), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed.

*Held*, also, that it was not necessary for the plaintiffs, in obtaining an *ex parte* order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods and returned them to the plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained.

*Held*, lastly, that a proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England.

*Lopez v. Chavarri*, [1901] W.N. 115, distinguished.

MOTION by the defendants to set aside an order allowing the plaintiffs to serve a writ of summons upon the defendants out of Ontario, and all proceedings subsequent thereto. The facts are stated in the judgments.

The motion was heard by Mr. Cartwright, Master in Chambers, on the 18th September, 1903.

*J. T. Small*, for the defendants.

*W. E. Middleton*, for the plaintiffs.

October 7. THE MASTER IN CHAMBERS:—In the spring of 1902 the defendant Kirkness was in Toronto and saw the



plaintiffs, who are a firm of wholesale dealers in fancy goods. At this interview it was agreed that the plaintiffs should send to the defendants, who are a firm doing business at Liverpool, samples of their goods.

This was done in due course ; and the consignment included 20 copies of No. 1465, being a picture known as "Awakening" or "Contentment."

After inspection and consideration an order was sent on 6th and 8th August. A letter was at the same time sent by the defendants stating that they had selected what they thought would sell largely, and urging the plaintiffs "to execute as promptly as possible."

No copies of "Contentment" were in that order.

The judgment of the defendants as to the probability of rapid sale of the plaintiffs' goods was verified. And on the 1st November the defendants sent by cable and also by accompanying letter a considerable order, in which were included 2,000 copies of "Contentment."

Before this second order was filled, the defendants were sued in the English King's Bench Division for alleged infringement of copyright of the picture "Contentment." And in their letter of the 15th November the defendants stated that, in view of these proceedings, they would be compelled to return the whole of the second order in due course after its arrival in England. The only reason given for this was the litigation already mentioned.

The plaintiffs strongly objected, but the defendants were firm in their view of their rights, and returned the goods, which, it would appear, were sold by the custom house officers in default of the payment of dues here in Toronto.

On the 28th February, 1903, the defendants sent to the plaintiffs a draft in settlement of what they conceded to be due, and refused to pay any more.

Thereupon the present action for about \$2,200 was commenced by an order of Mr. Winchester, Master in Chambers, of the 2nd April, allowing service on the defendants at Liverpool. The proper affidavit was made by one of the plaintiffs, claiming to be entitled to sue for goods sold and delivered.

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On the 13th June a motion was made before me to set aside the order and all proceedings thereunder on grounds set out in the notice. The motion was enlarged until after vacation to allow further material to be obtained; and was finally argued on the 18th September ult., and a further memorandum was afterwards put in by each party, which has caused the delay in disposing of the motion.

I entirely accede to what was urged by Mr. Small as to the duty of full disclosure of all material facts on applications under Rule 162. The principles laid down by Kekewich, J., in *Collins v. North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228; by Kay, J., in *Republic of Peru v. Dreyfus* (1886), 55 L.T. N.S. 802, at p. 803; and by Chitty, J., in *In re Burland's Trade Mark* (1885), 41 Ch. D. 542, at p. 545; and other cases; are most salutary, and I trust that I shall always be forward to give effect to them in a proper case. But I do not see that there was anything here to complain of. The plaintiffs' affidavit alleged a claim for goods sold and delivered. The fact that the defendants had thought fit to refuse acceptance, and had returned them, was not necessary to be mentioned. Whether the defendants could justify their conduct was a matter to be determined at the trial. At present the only substantial question is, whether, under the foregoing state of facts and the documentary evidence, an action will lie for goods sold and delivered.

And, in my opinion, it will, for the following reasons.

The orders of the defendants to the plaintiffs which are in evidence on the motion both bear on their face these words:

"Shipment to Liverpool." "*Via* Leyland Line Steamer from Boston. Delivered f.o.b. vessel." The shipping bills are to the same effect.

There is no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit.

Mr. Small relied on *Atkinson v. Bell* (1828), 8 B. & C. 277, *Scott v. Melady* (1900), 27 A.R. 193, and other cases, as shewing there was no delivery.

Mr. Middleton relied on *Fragano v. Long* (1825), 4 B. & C. 219; *Wait v. Baker* (1848), 2 Ex. 1 (judgment of Parke, B., at

p. 7); *In re Wiltshire Iron Co., Ex p. Pearson* (1868), L.R. 3 Ch. 443 (judgment of Selwyn, L.J., at p. 450.)

The two older cases are commented on in Benjamin on Sales, 7th Am. ed., p. 348, and elsewhere, and in Blackburn on Sales, 2nd ed., p. 131.

The facts of the present case seem clearly to resemble those of *Fragano v. Long*. The only difference that I can see is the fact of insurance.

But, apart from that, the expressions of the Judges in *Atkinson v. Bell* shew that Holroyd, J., relied on the fact that "there was no specific appropriation of the machines assented to by the purchaser:" p. 284.

Littledale, J., said: "Goods bargained and sold will not lie unless there be a sale . . . (and) unless there was an assent by the defendant to take the articles. Here there was no assent. The property must be changed, to make the action maintainable. If the property had been changed, the maker could not have delivered these machines to any one but the defendants."

And in *Fragano v. Long* Holroyd, J., said (p. 223): "When goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off."

This last passage is cited by Selwyn, L.J., as laying down the correct rule of law.

Lord Blackburn (2nd ed., pp. 130, 131, 132) distinguishes these two cases (both decided within three years by the same three Judges) on the ground that in *Atkinson v. Bell* the property was still in the vendors, who had not parted with the possession, and who had made no appropriation to the defendants.

Mr. Benjamin is not satisfied as to the success of any of the attempts which have been made to reconcile the apparent conflict. He says (p. 349): "Many attempts have been made to reconcile *Atkinson v. Bell* with the principles recognized in the other cases on the subject" (*i.e.*, effect of contract in passing property, of subsequent appropriation), "but it is very difficult to avoid the conclusion that a conflict really exists, and that, if correctly reported, the case would not, on this particular point,

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be now decided as it was in 1828." The learned author had on p. 348 contrasted it with *Fragano v. Long*.

Lord Blackburn (p. 131) says: "Fragano's bargain was, that the goods should be dispatched, and his vendor had begun to dispatch them."

This exactly coincides with the facts of the present case.

*Scott v. Melady*, 27 A.R. 193, was relied on by Mr. Small. But all that case decides is that upon the facts there was no appropriation or delivery of the wheat, nor any sufficient acceptance by the buyer to satisfy the Statute of Frauds, the agreement to buy having been verbal only. But the facts of the case under consideration are entirely different. I cannot see how it can be seriously disputed that the goods became the property of the defendants once they reached Boston. See Benjamin, p. 701.

There is no pretence that the goods were not up to sample or as represented by the plaintiffs.

Indeed, the defendant Kirkness, as we have seen, was in Toronto in the spring. The plaintiffs had, as requested, sent on samples, and afterwards the defendants' order was filled and sent forward and only returned on account of the litigation in England about the copyright of "Contentment."

These facts seem to distinguish the case from both *Bannerman v. White* (1861), 10 C.B. N.S. 844, and *Varley v. Whipp*, [1900] 1 Q.B. 513, which are also relied on by the counsel for the defendants.

Finally, the defendants argued that this is not a case which the Court should, in its discretion, allow to be tried in Ontario, alleging that the facts to be tried and the principal witnesses are in England, and citing *Lopez v. Chavarri*, [1901] W.N. 115.

I have recently expressed the opinion that the Court has discretion (see *Postlethwaite v. McWhinney* (1903), 2 O.W.R. 796, and cases cited\*)—what Mr. Justice Farwell in the preceding case calls "the general discretion of the Court under order XI, r. 1, which he says is not fettered by any considerations of comparative cost and convenience (as it is under r. 2, which is not found in our Rules).

\* This case is now reported *ante* p. 412.



Now I have no hesitation in saying that in a case of which the facts were similar to those in *Lopez v. Chavarri* it would be a most proper, if not a necessary, exercise of discretion to remit the parties to the forum of the defendants, being also the *forum domicilii* of both parties.

But here there are no such facts as were before Mr. Justice Farwell. And I think the observations of Lord Chancellor Halsbury in *Comber v. Leyland*, [1898] A.C. 524, at p. 527, may properly be invoked by the plaintiffs, "that where the parties have agreed that something is to be done in this country, some part of the subject matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country." In the present case payment was admittedly to be made, as it was partially made, in this country, and not elsewhere.

The only substantial defence here is the English law of copyright. Assuming that this can be successfully set up here, I do not think it is a ground for requiring the plaintiffs to prosecute their claim in England, where the expense would be very much greater and they would have to give security for costs.

The motion must be dismissed with costs to the plaintiffs in the cause in any event.

After the long delay the defendants must be put on terms to ensure the matter being tried at the January Sittings, if the plaintiffs so desire.

The defendants appealed from the Master's order, and their appeal was heard by MACLAREN, J.A., sitting in Chambers for a Judge of the High Court, on the 16th October, 1903.

The same counsel appeared.

October 27. MACLAREN, J.A. :—The defendants appeal from the judgment of the Master in Chambers dismissing their motion to set aside the order allowing service out of Ontario. The first ground is that the action does not come within Rule 162 (1) (e), not being for a breach within Ontario of a contract

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to be performed within Ontario. It is urged that the contract was a sale by sample; that the defendants had a right to inspect the goods on arrival at Liverpool; and that the breach of contract, if any, was in the defendants' refusal to accept the goods at Liverpool. When ordering the goods, the defendants directed them to be shipped by Leyland line steamer from Boston, they paying freight. I can find nothing in the contract to take this case out of the general rule, that the property would pass to the purchaser on the delivery of the goods on board the vessel at Boston, and that an action would thereupon lie for goods sold and delivered. In *Atkinson v. Bell*, 8 B. & C. 277, *Philpotts v. Evans* (1839), 5 M. & W. 465, and *Scott v. Melady*, 27 A.R. 193, cited on behalf of the defendants, there was no delivery to the defendants, and the property had not passed, so that they are not at all analogous to the present case.

The purchasers were, no doubt, entitled to inspect the goods before accepting. But, even in case of a sale by sample, *prima facie* the place of delivery is the place for inspection: *Perkins v. Bell*, [1893] 1 Q.B. 193, at p. 197. There is nothing in the contract in this case to rebut this presumption.

As payment should have been made in Toronto, the breach occurred by reason of non-payment there.

The defendants further claim that the order should be set aside because the plaintiffs' affidavit on which the *ex parte* order was obtained, did not fully set out the facts, inasmuch as it did not disclose the facts that the defendants refused to receive the goods at Liverpool, but shipped them to the plaintiffs at Toronto, and that they were lying there at the time action was brought. Also that the affidavit should have set out the facts regarding the English copyright of one of the pictures, and that the defendants had paid for all the goods which they retained.

Rule 163 prescribes what the affidavit on behalf of the plaintiff in such a case must contain. So far as relates to the contest between the present parties, it should state that the applicant has a right to the relief claimed; the grounds upon which the application is made; and that the case is a proper one for service out of Ontario under the Rules. There is nothing in the Rule requiring the plaintiff to set out a counterclaim

for damages which the defendants may possibly set up. The defendants do not complain of the affidavit except for non-disclosure as aforesaid. The action is not to be tried out on the present application.

The plaintiffs, having complied with Rule 163 and shewn that *prima facie* they have a right of action under Rule 162 may properly be allowed to serve the defendants out of Ontario.

The defendants claim, however, that, even if the present action falls under Rule 162, the Court should not exercise its discretion in favour of allowing the service, but should compel the plaintiffs to go to England and sue the defendants there. In support of this contention *Lopez v. Chavarri*, [1901] W. N. 115, has been cited. In that case, however, both parties and all the witnesses resided in Spain; the contract was a Spanish one, and to be interpreted by Spanish law; and, if the action were brought in England, it would be necessary to ascertain the Spanish law by a commission or by the aid of a Spanish tribunal. Here the contract is an Ontario one, to be determined by Ontario law, and the facts respecting the English copyright raised by the defendants, if not agreed upon by the parties, are capable of being ascertained and determined without much difficulty.

On the whole I think that the learned Master properly exercised his discretion in favour of an Ontario action, and that the appeal fails on all points.

Appeal dismissed with costs in the cause to the plaintiffs in any event.

E. B. B.

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## [DIVISIONAL COURT.]

D. C.

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April 8.  
Nov. 21.

## TRAVISS V. HALES ET UX.

*Husband and Wife—Liability of Husband for Torts of Wife.*

*Held*, affirming the judgment of STREET, J., that a husband is still liable for the torts of his wife, if the marriage took place before the 1st July, 1884. The provisions of the Married Women's Property Act, 1884, 47 Vict. ch. 19 (O.), applicable to persons married before that date, do not relieve him from liability.

*Earle v. Kingscote*, [1900] 2 Ch. 585, applied and followed.

*Amer v. Rogers* (1880), 31 C.P. 195, overruled.

*Lee v. Hopkins* (1890), 20 O.R. 666, approved.

THE action was brought against a husband and wife, who were married on the 13th May, 1875, to recover damages for a slander uttered by the wife in April, 1901.

The action was tried before STREET, J., without a jury, at Lindsay, on the 15th March, 1903.

It was agreed that there should be judgment against the wife for \$1 and costs, and that judgment for the same verdict should also go against the husband if he should be held liable under the law as it stands for this tort of his wife, and that the parties should be in the same position as if the counsel for the husband had moved to have a nonsuit entered for him at the trial upon the ground that he was not liable for the torts of the wife.

*J. W. McCullough*, for the plaintiff.

*F. A. McDiarmid*, for the defendant.

April 8. STREET, J.:—I think the weight of authority seems in favour of the view that at common law the husband was liable for the torts of the wife as a matter of principle and not by reason merely of the fact that he was a necessary party to an action against her: Bacon Abr. Baron & Feme (L); *Head v. Briscoe* (1833), 5 C. & P. 484; *Wainford v. Heyl* (1875), L.R. 20 Eq. 321; *Seroka v. Kattenburg* (1886), 17 Q.B.D. 177; *Lee v. Hopkins* (1890), 20 O.R. 666, and cases there cited. But see to the contrary effect, *Amer v. Rogers* (1880), 31 C.P. 195.

If there existed a direct liability at common law, I cannot find in sub-sec. 2 of sec. 3 of the Married Women's Property



Act, R.S.O. 1897, ch. 163, anything sufficient to relieve the husband from it. I agree that if the husband's common law liability were one which did not exist except because of a mere rule of procedure which required him to be joined as a party to an action against the wife, then his liability would cease with the abolition of the rule of procedure, as was held in *Amer v. Rogers*, but I think, with great respect, that the liability of the husband was a necessary part of the common law principle of the identity of husband and wife. That identity has been gradually dissolved by the various stages of the Married Women's Property Acts, but the liability to be sued along with his wife and to be made liable in such an action for her torts, is still maintained to a limited extent by sec. 17 of ch. 163, R.S.O., and is by that section continued without any limitation down to the present time, so far as persons married before the 1st July, 1884, are concerned.

There should therefore be judgment for the plaintiff for \$1 and the costs of the action on the High Court scale against both these defendants.

The defendant Richard Hales appealed from this judgment, and his appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 9th November, 1903.

*F. A. McDiarmid*, for the appellant, referred, in addition to the cases cited above, to *McFarlane v. Murphy* (1874), 21 Gr. 80; *Consolidated Bank of Canada v. Henderson* (1879), 29 C.P. 549; *Capell v. Powell* (1864), 17 C.B.N.S. 743.

*J. W. McCullough*, for the plaintiff, cited *Earle v. Kingscote*, [1900] 2 Ch. 585; *Phillips v. Barret* (1876), 1 Q.B.D. 436; *Catterall v. Kenyon* (1842), 3 Q.B. 310; Addison on Torts, 7th ed., p. 122.

November 21. The judgment of the Court was delivered by MEREDITH, C.J.:—The action is against the appellant and his wife for words defamatory of the respondent published by the wife during coverture. The marriage of the appellant and his wife took place on the 13th May, 1875; and the question for decision is, whether the provisions of the Married Women's

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Property Act applicable to persons married before the 1st July, 1884, (when the Act 47 Vict. ch. 19 (O.) came into force), have the effect of relieving the husband from liability for the torts of his wife committed during coverture.

There has been great diversity of opinion on this question. In *Amer v. Rogers*, 31 C.P. 195, it was decided by Osler, J., that the effect of the Act applicable in that case, which is the same as applies in this case, was to relieve the husband from the liability; while in *Lee v. Hopkins*, 20 O.R. 666, Rose, J., came to the opposite conclusion.

In many of the Courts of the neighbouring Republic in which the question has arisen on statutes making no greater changes than did our Acts prior to 47 Vict. ch. 19, in the rights of married women, the same view has been adopted as was taken by Osler, J., in *Amer v. Rogers*, and his view is also concurred in by Mr. T. Cyprian Williams, 16 Law Quarterly Review, p. 191; by the author of *Lush on Husband and Wife* (1st ed.) 256; and by the editors of the second edition of the same work, pp. 290 and 291.

It has, however, been decided by the Court of Appeal in England that the effect of the English Acts is not to relieve the husband of his liability: *Earle v. Kingscote*, [1900] 2 Ch. 585, adopting and following the view of a Divisional Court in *Seroka v. Kattenburg*, 17 Q.B.D. 177.

Notwithstanding the opposing views to which I have referred and the doubt expressed\* by Rigby, L.J., in *Earle v. Kingscote*, we ought to follow the decision of the Court of Appeal in that case, unless there is such a difference between the English statutes and our own as to justify our coming to the opposite conclusion.

I am unable to discover any such difference.

The ground upon which the English cases proceeded was that the right conferred of suing the wife alone in respect of torts committed by her during coverture was an additional right given to the person wronged, and that there was nothing in their Acts to take away from him his common law right of suing the husband and wife jointly, and there is, I think, nothing in our Acts prior to 47 Vict. ch. 19, to enable us to say

that the common law right is taken away, if upon the provisions of the English Acts it was not.

The result is that the appeal fails and must be dismissed with costs.

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[DIVISIONAL COURT.]

MCCORMACK v. GRAND TRUNK R.W. Co.

D. C.  
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Nov. 26.

*Railway—Carriage of Goods—Liability for Loss—Dog—Common Carriers.*

The defendants are, by the Railway Act, 51 Vict. ch. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him. Distinction between the English and Canadian Railway Acts pointed out. Judgment of the county court of Wentworth affirmed.

AN appeal by the defendants from the judgment of the senior Judge of the county court of Wentworth in an action in that court, tried without a jury, brought to recover damages for the loss of a field spaniel delivered to the defendants by the plaintiff to be carried from Hamilton to South River, in the district of Parry Sound. The dog, while in charge of the defendants' servants, escaped and was never recovered. The Judge found the defendants liable, and assessed the damages at \$100, for which amount judgment was entered with costs.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., and MACMAHON, J., on the 12th November, 1903.

J. W. Nesbitt, K.C., for the defendants. There was no negligence on the part of the defendants. They used the means of securing the dog furnished by the owner, which were apparently sufficient, and are not to be blamed for the escape: *Richardson v. North Eastern R.W. Co.* (1872), L.R. 7 C.P. 75. There is no evidence that the defendants were common carriers. They are common carriers only of goods which they profess or are bound to carry: *Dickson v. Great Northern R.W. Co.* (1886) 18 Q.B.D. 176; *Macnamara on Carriers*, pp. 118, 120, 121;

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*Winsford Local Board v. Cheshire Lines Committee* (1890), 24 Q.B.D. 456, 459. On the facts the defendants are not liable; the negligence, if any, was that of the plaintiff.

*S. F. Washington*, K.C., for the plaintiff. If the defendants are common carriers, they are liable. The onus is on them to shew that they are not. They pleaded that they took the dog upon special conditions, which is an admission that they are common carriers subject to those conditions. The onus is not on the plaintiff, but evidence was given that defendants were in the habit of carrying dogs.

November 26. The judgment of the Court was delivered by MACMAHON, J.:—The plaintiff shipped a deer hound and the dog in question on the 1st November, 1902, for the carriage of which he paid 80 cents each, receiving from the defendants a check for each dog. The dogs were put into the baggage car at Hamilton by the baggageman who had charge of them, and according to the evidence each had a collar. A chain was fastened to the collar of the hound by a snap, and the other end of the same chain was fastened to the collar on the spaniel by a cross-bar to a ring on the collar. There was a ring in the middle of the chain for the convenience of the person leading or holding the dogs.

When the train reached Toronto, the baggageman removed the dogs from the car and taking the cross-bar from the ring on the spaniel's collar put the chain through under the collar, bringing the heads of the two dogs together, and used the end of the chain to tie the dogs to a post at the overhead stairway in the Union Station, until the train for Parry Sound should be ready to leave. The baggageman was leading the dogs to the Parry Sound train when the spaniel backed up and pulled his head through the collar and escaped and was not recovered.

The learned trial Judge found that the collar on the spaniel was sufficiently strong, and that the company, having for its convenience altered the way in which the dog was fastened, could not complain of the manner in which the dog was secured.

The main ground of appeal, and the only one seriously urged, was, that the defendants are not common carriers of



dogs and therefore not insurers thereof, but merely bailees for hire or reward and not liable for the escape and loss of the dog; and *Dickson v. Great Northern R.W. Co.*, 18 Q.B.D. 176, was relied upon in support of the contention.

By the English Railway and Canal Traffic Act, 17 & 18 Vict. ch. 31, sec. 1, the expression "traffic" includes "animals," and it is the same in our Railway Act, 51 Vict. ch. 29, sec. 2, sub-sec. (v) (D.)

The 2nd section of the English Act provides that the company shall afford all reasonable facilities for the receiving and forwarding and delivery of traffic. And Lord Esher, M.R., in *Dickson v. Great Northern R. W. Co.*, 18 Q.B.D. at p. 180, referring to that section, said: "Therefore it appears to me that the defendants are bound by statute to afford reasonable facilities for carrying, among other animals, dogs. Then by sec. 7 of the Act it is provided that the company shall be liable for the loss of or any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being thereby declared void. If the section stopped there, the company would be bound to carry dogs for hire, but not, I think, as common carriers. I think their liability would be that of bailees for reward, and such liability could not be affected or limited by any notice, condition, or declaration they might make or give. But then there comes a proviso to the effect that nothing contained in the Act shall be construed to prevent the company from making such conditions with respect to the receiving, forwarding, and delivering any of the said animals, articles, goods, or things as shall be adjudged, by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable. Inasmuch as the Act declares that *prima facie* all such conditions are to be null and void, it seems to me that it lies on the company to shew that any condition upon which it may rely is just and reasonable."

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The learned Master of the Rolls points out that the condition sought to be imposed by the railway company for carrying the dog, for the loss of which the action was brought, was unjust and unreasonable and therefore void. He then (p. 182) says: "In effect, therefore, what the company do in the case of dogs, which they are bound by statute to carry on reasonable terms, is to say that they will not carry them except on the terms of being subject to no liability whatever beyond £2, and to give no alternative. The cases decide that, if no alternative is given, such terms are unreasonable."

By sec. 246 (1) of our Railway Act, it is provided that railway companies shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto offered for transportation at the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way passengers and goods from the trains: (2) Such passengers and goods shall be taken, transported to and from, and discharged at such places, on the due payment of the toll, freight or fare lawfully payable therefor: (3) Every person aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.

So that, as pointed out by Osler, J.A., in *Cobban v. Canadian Pacific R. W. Co.* (1896), 23 A.R. 115, at p. 119, the language of sec. 7 of the Imperial Act enables a company to make a special contract with just and reasonable conditions, while ours contains an absolute denial of power to escape from liability for negligence.

In *Robertson v. Grand Trunk R. W. Co.* (1894), 21 A.R. 204, Osler, J.A., at p. 215, referring to sec. 2 (f) of the Railway Act, which provides that the term "goods" shall include things of every kind that may be conveyed upon the railway, says that it "would therefore seem to include animals and live stock of all kinds for the conveyance of which the ordinary carriages of the company are suitable. . . . I think, therefore, it must be held that, as said by Strong, J., in *Vogel's case*

(1885), 11 S.C.R. 612, the effect of this legislation (secs. 223, 224, 225, 226, 227, and 246, of the Railway Act) is to make the company common carriers of goods, or at least to impose upon them the same duties as those to which by the common law common carriers are subject in respect of the carriage of goods."

The defendants being by the Railway Act common carriers of animals of all kinds, this dog was received by them as common carriers, and, as it was not delivered to the plaintiff in accordance with its contract, the company is liable for the loss; and the appeal must be dismissed with costs.

I may say that in *The Queen v. Slade* (1888), 21 Q.B.D. 433, it was held that a dog is "goods" within the meaning of 2 & 3 Vict. ch. 71, sec. 40, and therefore a magistrate has jurisdiction under that section to order the dog to be delivered to its owner. And during the argument Hawkins, J., said: "Surely under a bequest of 'all my worldly goods' a dog would pass to the legatee."

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## RE PAKENHAM PORK PACKING CO.

Nov. 7.  
Nov. 14.

*Company—Winding-up—Action for Calls—Counterclaim for Rescission—Leave to Proceed Refused—Leave to Appeal.*

Previous to an order for the winding-up of the company under the Dominion Winding-up Act an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus :—

*Held*, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim ; and his application for leave to proceed in the action notwithstanding the winding-up order, was refused, but leave to apply again was reserved.

Dictum of Strong, C.J., in *In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644, at pp. 665-6, explained.

Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed, was refused.

AN appeal by William Gorrell from an order of J. A. McAndrew, Official Referee, made in the course of a reference for the winding-up of the company, refusing an application by the appellant for an order that the action and the counterclaim be proceeded with, notwithstanding the order made for the winding-up of the company, pursuant to R.S.C. 1886, ch. 129, and amending Acts.

The appeal was heard by BRITTON, J., in the Weekly Court, on the 13th October, 1903.

*George Bell*, for the appellant.

*S. B. Woods*, for the liquidator.

November 7. BRITTON, J. :—An action was commenced by the company against the appellant on the 4th April, 1903, for the unpaid calls upon 4 shares of preference stock and 7 shares of common stock in said company.

On the 25th April, 1903, the appellant put in his defence and also a counterclaim asking that his application for the stock be cancelled and rescinded on the ground of misrepresentation and of false and fraudulent statements in the prospectus, etc., on which statements the appellant says he relied.

Issue was joined on the 29th April, 1903.

On the 11th June, 1903, a winding-up order was made.



On the 26th September the appellant applied to Mr. McAndrew, Official Referee, for leave to proceed in the action, pursuant to sec. 16 of R.S.C. ch. 129. This leave was refused, on the ground that an appointment has been taken out to settle the list of contributories, and that all the defences raised by the appellant can be dealt with upon the application to place him upon the list of contributories, with a right of appeal as wide as an appeal in an action that has been tried.

If that is the case, the action ought not to be allowed to proceed. There are in all about 16 actions, and, if all are allowed to proceed, a great delay may ensue and very large expense will be incurred; whereas, if the Official Referee is correct in his view of the law—that all the rights of the appellant as set up in his statement of defence and counterclaim can be asserted and dealt with by the Official Referee—delay and expense will be avoided.

This case is, after all, simply whether the appellant is or is not a contributory. The counterclaim in the action is only of importance as shewing what the appellant's contention is, and if the company was not in liquidation it would be the only way of getting his name removed from the list of shareholders. Now that the company is being wound up, there is no reason why the learned Official Referee, if he has jurisdiction, should not deal with the matter, subject to appeal, and it is eminently proper that he should, allowing the appellant, on the grounds stated in the statement of defence and counterclaim in the action, to move to have his name taken off the list. The Referee is, in my opinion, right in thinking that he has complete jurisdiction. The dictum which would on first impression seem to be against that view is that of the Chief Justice in *In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644, at pp. 665-6. He said: "Relief by way of rescission is beyond the jurisdiction of the Master in a winding-up proceeding under the Dominion statute."

I think the learned Chief Justice did not intend to go so far as to say that the Master had no jurisdiction to declare rescission to the extent of removing a name from the list of contributories, or, in other words, to give effect to a defence, if

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proved, of fraud in procuring the signature of a person as shareholder.

The Master has no authority to grant substantial relief such as might be claimed by counterclaim, or to rescind in the case of a sale by a promoter, or to give the consequential relief which in some cases rescission would involve.

The appellant, having resisted the claim for calls, and having put in his defence and counterclaim before the winding-up order, is not too late to insist upon the same defence now, if he can establish it: see *Whiteley's Case*, [1900] 1 Ch. 365.

In view of what is said in the *Hess Manufacturing Co.* case, I add that if the appellant shall not be able, by reason only of want of jurisdiction of the Official Referee, to avail himself of his full defence before said Official Referee as in the action, the present application and my decision therein shall not stand in the way of, or prejudice the appellant in, a future application, and the case stands for that purpose pending the proceedings in liquidation.

Appeal dismissed. Costs reserved until after determination of the question of the appellant's liability.

The appellant on the 12th November, 1903, applied to BRITTON, J., for leave to appeal from the above decision.

The same counsel appeared.

November 14. BRITTON, J.:—In my opinion, no harm can happen to the appellant by proceeding in accordance with the order already made, while greater delay and more expense will necessarily result from an appeal. The action should not be allowed to proceed unless that is the only way open for the appellant to get in his defence as set out in the statement of defence and counterclaim.

Leave to appeal refused. No costs.

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[MEREDITH, C.J.C.P.]

## RE SOMBRA PUBLIC SCHOOL SECTION No. 26.

1903

*Public Schools—Selection of Site—Arbitration and Award.*

Nov. 2.

Under sec. 34 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.), the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing (from the trustees) as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site.

THIS was an application by the trustees of public school section No. 26 of the township of Sombra, to set aside an award of arbitrators appointed under the provisions of sec. 34 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.), in consequence of a difference of opinion between the trustees and the ratepayers as to the suitability of the site which the trustees had selected for the school house of the section which had been recently formed. The facts are stated in the judgment.

The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 8th September, 1903.

*W. E. Middleton*, for the applicants.

*W. R. Riddell*, K.C., and *A. B. Carscallen*, for the respondents.

November 2. MEREDITH, C.J.:—The main question argued was as to the power of the arbitrators to fix as the site any other place than that selected by the trustees, the contention of the applicants being that the arbitrators' only jurisdiction was to determine whether or not the site selected by the trustees was a suitable one.

I have reluctantly come to the conclusion that this contention is well founded.

It is no doubt the duty of rural school trustees to provide adequate accommodation for two-thirds of the children between the ages of five and sixteen years resident in the section (sec. 65 (3)), and to purchase or rent school sites or premises and to build school houses (sec. 65 (4)); and they may select a site for a new school house, but, according to the provisions of sub-sec.

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(1) of sec. 34, no site may be adopted, "except in the manner hereinafter provided," without the consent of the majority of the ratepayers present at a special meeting, which the trustees are required to call for the purpose of considering the site selected by them.

In case of a difference between the trustees and the majority of the ratepayers as to the suitability of the site selected by the trustees, provision is made by sub-sec. (2) of sec. 34 for an arbitration and an award upon the matter submitted to the arbitrators.

Beyond this bald statement there is no provision as to what is to be the scope of the reference; but it appears to me that what is meant by the expression "the matter submitted" must be the suitability of the site selected by the trustees. There is nothing in the language used to indicate that it was intended to confer upon the arbitrators power to fix the site, though the site determined on by them differed from that selected by the trustees. The scheme of the Act seems to be that the trustees must initiate the proceedings which are to result in the adoption of a site, by selecting what they deem to be a suitable one, but that they may not adopt it as the site without the consent of the ratepayers, unless, upon a difference and consequent reference to arbitration in manner provided by sec. 34 (2), an award has been made approving of the site which the trustees have selected.

If there were no provision for arbitration, it is clear that the site selected by the trustees may not be adopted by them without the consent of the majority of the special meeting, and all that the Legislature has done, as it appears to me, is to provide that where that consent cannot be obtained there may be substituted for it the approval of the arbitrators.

I should have much preferred to have come to a different conclusion, for it is obvious, I think, that the construction which I have felt myself compelled to place upon the statute may make it very difficult where, as in this case, there is a bitter conflict between the trustees and the majority of the ratepayers, to reach a conclusion which will enable the trustees to perform their statutory duty of providing adequate school accommodation for the children of the section; for if, as I



think, it was the duty of the arbitrators in this case, having come, as I assume they did, to the conclusion that the site selected by the trustees was not a suitable one, to have confined their award to so determining, it will be impossible to reach the point of adopting a site until the trustees and the majority of the ratepayers are of one mind, or the arbitrators appointed have reached the conclusion that some site selected by the trustees is a suitable one.

Having come to this conclusion, it is unnecessary to deal with the other questions argued in support of the application.

The result is that the award must be set aside, but without costs, unless the respondents desire that the matters referred should be remitted to the arbitrators in order that they may make an award approving or disapproving of the site selected by the trustees, with a declaration as to the powers of the arbitrators under the reference, in accordance with the opinion I have expressed. If the respondents so elect, such an order may go, without costs to either party, unless the appellants desire to be heard on this point, and if they desire to be heard no order will issue until further argument has been had.

T. T. R.

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[FERGUSON, J.]

1903

SMITH V. GRAND ORANGE LODGE OF BRITISH AMERICA.

Nov. 11.

*Life Insurance—Medical Examination—Misstatements and Concealments—  
 E.T. 98 Materiality—Breach of Warranty—Cancellation of Policy.*

In the plaintiff's application to the defendants for a policy of life insurance he warranted, amongst other things, that the answers in the medical examination, which formed part thereof, were full, complete, and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon.

In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of "la grippe," for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing:—

*Held*, that these statements and concealments were material and constituted a breach of warranty; and therefore the policy was void.

Judgment was given for the defendants on their counterclaim for delivery up of the policy to be cancelled.

ACTION for a declaration of the validity of a certificate or policy of insurance on the life of the plaintiff. The defendants counterclaimed for delivery up and cancellation of the certificate. The facts are stated in the judgment.

The action and counterclaim were tried before FERGUSON, J., without a jury, at Toronto, on the 19th and 20th October, 1903.

*John MacGregor and H. M. East*, for the plaintiff.

*J. A. Worrell*, K.C., for the defendants.

November 11. FERGUSON, J.:—On the 2nd April, 1903, the defendants issued a certificate of membership to the plaintiff by which the life of the plaintiff became insured for the sum of \$1,000, if it be assumed that the certificate was honestly and properly obtained by the plaintiff. On the 12th May, 1903, the defendants' secretary wrote the plaintiff as follows:—  
 "Enclosed please find \$5.96, the amount of money you paid in connexion with certificate No. 6805 in this department, as I

have received instructions to cancel said certificate at once. You will therefore govern yourself accordingly, as the executive of the Grand Orange Lodge of British America benefit fund has decided to repudiate all responsibility for the insurance under said certificate No. 6805." This number was the number of the plaintiff's certificate.

On the 15th May, 1903, the defendants' solicitors wrote the plaintiff as follows:—"We are instructed by the Grand Orange Lodge of British America to request the immediate delivery to us of the certificate of insurance obtained by you from them, a notice of the cancellation of which was given you by a letter from the secretary under date of the 12th May. Unless this certificate is delivered to us to-morrow, we shall be obliged to issue a writ," etc.

The plaintiff on the 18th May, 1903, brought this action, alleging that, while he, the plaintiff, was in good standing and entitled to the benefit of the contract of insurance according to the terms of the said certificate, the defendants wrongfully and without just cause or legal justification, and in breach of their agreement with the plaintiff, notified him, the plaintiff, that they had withdrawn the insurance and refused to continue the same, and illegally and without just cause or excuse declared the contract of insurance to be cancelled and void and of no effect or value, and demanded the return and cancellation of the certificate.

The plaintiff claims a declaration that the contract of insurance of the plaintiff for \$1,000 is a good, valid, and subsisting contract, and that the plaintiff is entitled to all the rights and benefit of the same; that the defendants may be restrained from cancelling the said certificate and committing a breach thereof; and that the same may be declared to be in full force and effect against the defendants and that the defendants are bound by the same according to the terms thereof. In the alternative damages are claimed.

The defendants in their statement of defence admit the issue of the certificate to the plaintiff, and say that as a consideration therefor the plaintiff did warrant the representations, statements, and answers as contained in the plaintiff's application for such certificate and in the medical examination which formed

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part thereof, to be full, complete, and true, and without any suppression of facts, so far as such representations, statements, and answers were material to the contract of insurance to be based thereon. The defendants then, after setting forth a rather wordy agreement, which, I think, need not be further followed out here, say: that shortly after the issue of the said certificate, namely, on the 12th May, 1903, they, the defendants, learned that certain material representations, statements, and answers in the said application contained, were untrue, and that certain other facts material to the contract of insurance had been suppressed, and that they, the defendants, thereupon returned to the plaintiff the moneys paid by him in connexion with the said certificate, cancelled the certificate, and repudiated all further liability in respect thereof. The defendants further say that they demanded from the plaintiff the surrender and delivery of the certificate, with which demand the plaintiff refused to comply.

At the trial counsel for the defendants, without abandoning any of his grounds of defence, relied upon four items, namely:

1. That the plaintiff stated that he had not consulted or been attended by a physician for six years prior to the examination; whereas he had consulted four physicians within four months immediately prior to the same examination.

This statement of the plaintiff he warranted to be true, and it, amongst other statements, representations, and answers by him, formed the basis of the contract. I find upon the evidence that the statement was made, and was not true, and that the facts were as stated by the defence as above; and I am of the opinion and find that the statement was a material one.

2. The plaintiff stated that he had not had any illness, except a slight attack of "La Grippe," for three years next prior to his examination; whereas he had been ill for two months immediately prior to his said examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia.

This statement of the plaintiff was made and was also warranted by him to be true. It, amongst other statements, representations, and answers, formed the basis of the contract. It was not true, the facts being substantially as stated by the



defence as above. I find on the evidence and I am of the opinion that this statement was also a material statement.

3. The plaintiff concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of said examination.

The evidence shewed that this concealment took place. It was in violation of the plaintiff's warranty, and I am of the opinion and I find that it was a material concealment.

4. The plaintiff had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing; and, he having warranted that he was free from disease, there was a breach of the warranty, even if he did not know he was so diseased. I am of the opinion and I find on the evidence that the plaintiff had at the time of his examination the disease stated in this 4th ground, and I am of the opinion that the warranty was broken as stated by the defendants as above.

In these circumstances, I find it impossible for me to hold that this certificate is good and valid in the hands of the plaintiff, as he contends.

I think I should adopt the course taken in the case *Honour v. Equitable Life Assurance Society of the United States*, [1900] 1 Ch. 852, and declare the certificate or policy to be void for the reasons above given, and order that it should be delivered up to be cancelled.

There will be judgment dismissing the action with costs and for the defendants on their counterclaim with costs.

See also the case *Connecticut Mutual Ins. Co. v. Home Ins. Co.* (1879), 17 Blatch. 142, on demurrer.

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Ferguson, J.

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## [IN THE COURT OF APPEAL.]

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Nov. 16.

## EACRETT V. GORE DISTRICT MUTUAL FIRE INSURANCE CO.

*Fire Insurance—Policy on Goods—Partial Loss—Other Insurance—Proportionate Payment—Conditions of Policy—Construction—Overvaluation.*

The insurance was upon goods valued in the application at \$15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of \$6,250. The defendants' policy was for \$3,000; there was other insurance to the amount of \$7,000; and the total value of the goods at the time of the fire was \$9,274.62. Statutory condition No. 9 provides that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was indorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application":—

*Held*, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss, in accordance with statutory condition No. 9.

Judgment of Meredith, C.J.C.P., affirmed.

AN appeal by the defendants from the judgment of Meredith, C.J.C.P., at the trial at London, in favour of the plaintiff for the recovery of \$1,875, with interest and costs, in an action upon a fire insurance policy.

By an application in writing the plaintiff, on the 11th June, 1902, applied to the defendants for a policy of insurance to the amount of \$3,000 on goods described, represented to be of the cash value of \$15,000. The policy was issued, and the goods insured were, on the 12th July, 1902, damaged by fire to the extent of \$6,250. The actual value of the goods was \$9,374.82. There was \$7,000 insurance on the goods in other companies.

The policy was subject to the statutory conditions, and to a special condition or variation, fully set out in the judgment, the part relating to goods being as follows: "In the case of pro-

perty other than buildings, if the property insured is found by arbitration or otherwise to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application."

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The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on the 2nd October, 1903.

*W. R. Riddell*, K.C., and *H. E. Rose*, for the appellants. But for the variation of the statutory conditions the appellants would not be liable at all: see statutory condition No. 1. This fact assists in construing the variation, which enlarges the liability of the company, instead of cutting it down, so that there is no reason for applying the rule that the construction most unfavourable to the insured is to be adopted. The meaning of the variation is, that the appellants, instead of being liable to the extent of \$3,000 to contribute to make good to the plaintiff any loss by fire suffered by him, are liable to contribute only to the extent of such proportion of the actual value of the goods (\$9,374.82) as the amount insured (\$3,000) bears to the value given in the application (\$15,000). The actual amount to be paid by the appellant is to be determined in accordance with statutory condition No. 9. The insurance in other companies is \$7,000, and the case, if the appellants' construction of the variation is correct, must be treated as if the total insurance was \$7,000 *plus* \$1,875, or \$8,875, and the appellants should pay  $\frac{1}{8} \frac{8}{8} \frac{15}{15}$  of \$6,250, or \$1,320.42 which they offered to pay.

*G. C. Gibbons*, K.C., for the plaintiff. In the variation the amount which the insured shall be entitled to recover from the company is dealt with. The same construction must be applied to the latter part of the variation as to the former. There is nothing in the statutory condition as to the reduction of the amount of the policy. If the appellants were the only insurers, they would have to pay the whole loss, \$6,250, but, as they only had \$3,000 of the \$10,000 insurance, they need pay only  $\frac{3}{10}$  of this, equal to \$1,875.

November 16. The judgment of the Court was delivered by MACLENNAN, J.A.:—This appeal depends on the construction

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of statutory condition No. 9 of the Insurance Act, as varied by special condition, indorsed on the policy in the manner required by the Act.

The insurance was upon goods, valued in the application at \$15,000, The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of \$6,250. The defendants' policy was for \$3,000, and there was other insurance to the amount of \$7,000, and the total value of the goods at the time of the fire was \$9,374.82.

Upon that state of facts the case was argued before the learned Chief Justice; and the question was what sum the plaintiff was entitled to recover, having regard to the statutory condition No. 9, and the special condition indorsed on the policy by the company.

The learned Chief Justice decided that the plaintiff was entitled to recover three-tenths of the loss, that being the proportion of the defendants' policy to the whole amount of the insurance.

The conditions are as follows:—

Statutory condition 9: "In the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies."

There are also indorsed, in the method prescribed by the statute, certain variations and additions to the statutory conditions, among others the following:—

"The company is not liable for loss by theft before, at, or after a fire. The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value, of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property



insured is found, by arbitration or otherwise, to have been over-valued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application."

But for the special condition the judgment would be clearly right, being in strict accordance with the statutory condition No. 9, and the question is, how far, if at all, that is varied or qualified by the special condition.

The first observation to be made on the special condition is that it consists of two distinct parts, of which the first is applicable to the insurance of a building, and is not at all applicable to the insurance of goods such as the policy in question. It is only the second part which is applicable to the insurance of goods. But it is evident that, in order to ascertain the meaning of the second part, it must be read in the light of the first, for what it declares is, that the company shall be liable for a certain proportion, not of the loss, but of the actual value.

If there has been overvaluation in the application, then the liability is to be a proportion of the actual value. The company is apparently guarding itself against liability to pay a proportion of the value stated in the application, that is innocent overvaluation by the assured. Now, it is only in case of a total loss that a proportion of the actual value is to be paid. In other cases it is a proportion of the loss. If there had been a total loss here, then this part of the condition would have been distinctly applicable, and the defendants would have been liable for three-tenths of the actual value, that is, the proportion which the amount insured by all the companies bore to the value in the application. That is the plain meaning of the first part of the condition in the case of a building where not more than two-thirds of the value as represented in the application has been insured.

The language of the two parts of the condition is identical, and must receive the same construction; and it being clear, as I think it is, that in the case of a total loss the defendants would have had to pay three-tenths of the whole, it would be a strange result that in the case of a partial loss they should

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be liable to a less proportion. The only other construction of which the words admit is that the defendants should pay, not as provided in the 9th statutory condition, a ratable proportion of the loss with the other companies, but three-tenths of the actual value, or \$2,819.44.

I think, upon the best consideration I have been able to give to the case, that for these reasons the special condition is inapplicable to the case of a partial loss, and that the judgment should be affirmed.

E. B. B.

## [IN THE COURT OF APPEAL.]

## RE NORTH PERTH PROVINCIAL ELECTION.

## MONTEITH v. BROWN.

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Dec. 7.

## RE NORTH NORFOLK PROVINCIAL ELECTION.

## SNIDER v. LITTLE.

*Parliamentary Elections—Controverted Election Petition—Application to Fix Day for Trial—Delay—Extending Time for Trial—Grounds for—Discretion—Appeal—Form of Order.*

The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from the 10th March to the 27th June. On the 5th November applications were made by the petitioners to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the Judge was unable to fix dates, and, the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained, orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the Court would fix days for trial suitable to the Judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were made *bonâ fide* and not for delay:—

*Held*, that the applications to the rota Judge were in time to enable the trials to be commenced within six months from the date of the presentation of the petitions (excluding the time occupied by the session), within the meaning of secs. 47 and 48 of the Ontario Controverted Elections Act; and the failure to fix days could not be attributed to the petitioners: secs. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of the days in the hands of the rota Judges.

It was not open to the respondents to complain of lack of diligence by the petitioners within the six months, no days for trial having been fixed.

Much of what was necessary to be shewn on the applications to extend the time, transpired in the presence of the Judge, and the facts were within his own knowledge; there was no reason why he should not act upon that knowledge in considering the applications.

And, having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders; the Judge rightly exercised his discretion upon sufficient grounds and for sufficient reasons appearing before him, and his orders should not be interfered with.

The appropriate form of the orders would be to extend the time for fixing the days of trial, rather than the time for the commencement of the trial.

APPEALS by the respondents from orders of Osler, J.A., in Chambers, extending the time for the trial of the petitions until the 31st January, 1904.

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In the North Perth case the affidavit on which the application for the order was based was made by the solicitor for the petitioner, who stated that no motion had been made to fix the date of the trial of the petition (prior to one made on the 5th November, 1903), because the deponent was of opinion that the Court would fix a day for trial suitable to the engagements of the Judges so as not to conflict with their other duties; that the deponent was informed and believed that bribery was extensively practised on behalf of the respondent during the election; that the deponent believed that the petitioner could prepare for trial in one month; that the deponent believed that the requirements of justice rendered it necessary that the time for the commencement of the trial of this petition should be extended beyond the time limit prescribed by the Ontario Controverted Elections Act and amendments thereto; that the application to extend the time was made *bonâ fide* and not for the purpose of delay.

In the North Norfolk case an affidavit was made by the petitioner to the like effect.

The appeal was heard by MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, J.J.A., and STREET, J., on the 20th November, 1903.

*J. P. Mabee*, K.C., *H. L. Drayton*, and *A. G. Slaght*, for the appellants, contended that the petitioners were guilty of delay and that no grounds were shewn for an extension, referring to *The Algoma Dominion Election Case* (1888), 1 Ont. Elec. Cas. 448.

*J. Baird* and *E. B. Ryckman*, for the petitioners, pointed out that under the Ontario Controverted Elections Act it was for the rota Judges to fix a day for trial, the practice under the Dominion Act being different, and the *Algoma* case therefore distinguishable. They also contended that no appeal lay from the orders extending the time, citing *Re West Middlesex Election Petition* (1883), 10 P.R. 27; *Kennedy v. Braithwaite*, 1 Ont. Elec. Cas. 195 n.; *The South Victoria Case* (1883-4), *ib.* 182; *The L'Assomption and Quebec Election Cases* (1888), 14 S.C.R. 429; *The Beauharnois Election Case* (1902), 32 S.C.R. 111; *The Richelieu Election Case* (1902), *ib.* 118; *Chard v.*



*Myers* (1870), 3 Ch. Ch. 120. They also urged that the orders were made for sufficient reasons, citing *Re Addington Election* (1876), 39 U.C.R. 131; *The Norwich Case* (1869), 1 O'M. & H. 8; *Macdonald v. Ferdaïs* (1893), 22 S.C.R. 260.

*Drayton*, in reply, referred, on the question of the proper exercise of discretion in extending the time, to *Jarmain v. Chatterton* (1882), 20 Ch. D. 493; *Ormerod v. Todmorden Mill Co.* (1882), 8 Q.B.D. 664; *International Financial Society v. City of Moscow Gas Co.* (1877), 7 Ch. D. 241; *Craig v. Phillips* (1877), *ib.* 249.

December 7. The judgment of the Court was delivered by Moss, C.J.O.:—The facts in these two appeals are almost identical, and they were argued together.

They are appeals by Messrs. Little and Brown, the successful candidates, from orders made by Mr. Justice Osler, on the 11th November, extending the time for the commencement of the trial of the petitions against their respective elections, until the 31st January, 1904.

On the 5th November an application was made on behalf of the petitioners, Messrs. Snider and Monteith, to Mr. Justice Osler, one of the Judges on the rota, to fix days for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the learned Judge was unable to fix dates on which it was certain that the four Judges required would be able to proceed with the trials. The respondents were not prepared to agree to an extension of time, and the application to fix the date of trial stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before Mr. Justice Osler on affidavits, and the orders now appealed from were made.

The grounds of appeal chiefly relied on are that no material or sufficient facts or circumstances to justify the extension of time were shewn; that the petitioners were guilty of delay; and that there were no substantial reasons upon which a judicial discretion might or ought to be exercised in favour of the applications.

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Section 47 of the Controverted Elections Act enacts that, subject to the provisions of sec. 48, the trial of every election petition shall be commenced within six months from the time when the petition was presented, and, so far as practicable, shall be proceeded with *de die in diem*, unless on application supported by affidavits it is shewn that the requirements of justice render it necessary that a postponement of the case should take place.

The section further enacts that an application to postpone the case or extend the time for fixing the day of trial may be made to a Judge of the Court of Appeal at any time before the expiration of six months, and the Judge may thereupon, in his discretion, postpone the case or extend the time for fixing the day of trial to a day before or after the expiration of the six months.

Section 48 enacts that in the computation of any delay allowed for any step or proceeding in respect of the trial or for the commencement of the trial under the 47th section the time occupied by the session shall not be reckoned.

The material dates are the following :—

	1903
Presentation of petition - - - -	Feb'y. 4
Commencement of session - - - -	Mar. 10
Prorogation - - - - -	June 27
Application to rota Judge to fix dates of trial -	Nov. 5
Motion to extend time - - - - -	Nov. 11

On the 10th March, when the session commenced, one month and five days had elapsed since the time of the presentation of the petition. From the 27th June to and inclusive of the 5th November four months and eight days elapsed, making altogether five months and thirteen days to be reckoned from the date of the presentation of the petition. There were therefore seventeen days before the expiration of the six months. The last of these days would expire on Sunday the 22nd November. Reckoning in the most favourable way for the respondents, and excluding the following Monday, there remained the 20th and 21st November, for either of which the fifteen days' notice of trial required by Rule 27 might have been given by the registrar, if the learned Judge had been in a

position to fix either or both of them as the days for the commencement of the trials. The applications to the rota Judge were therefore in time to enable the trials to be commenced within the six months, and the failure to fix days cannot be attributed to the petitioners.

The provisions bearing on the fixing of days are secs. 16 and 47 of the Act and Rules 26 and 27, and these leave the matter in the hands of the rota Judges. The petitions, as far as conveniently may be, are to be tried in the order in which they stand in the list to be prepared by the registrar; the trials are to be commenced within six months from the presentation unless the time is extended; and the time and place of the trials are to be fixed by the Judges on the rota. And the fact that, owing to other engagements, the Judges were unable to commence the trials within the time limited should not prejudice the petitioners. Probably the only motion open to them, under the circumstances, was to extend the time for fixing the days of trial.\*

It was argued that the petitioners have shewn no diligence in preparing for trial, and that the affidavits shew that they would not have been ready to proceed on any of the days mentioned. But, if the days had been fixed, they would have been obliged to proceed, or shew good grounds for a postponement. If they proceeded, their want of preparation could be no disadvantage to the respondents; and if they applied for a postponement, their neglect to take the usual steps could be strongly urged in opposition to the application. While the lapse of three months from the presentation of the petition without the day for trial having been fixed entitles any elector interested in the election to move under sec. 46 to expedite matters by procuring himself to be substituted for the petitioner, it is not open to the respondent to complain of lack of diligence by the petitioner within the six months—no days for trial having been fixed. If the days had been fixed, and there were delays after that, different considerations might arise: *Re Addington Election*, 39 U.C.R. 131.

\* See now Rule 27 of the General Rules and Orders respecting trials of Election Petitions promulgated on the 23rd December, 1903.

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Much of what was necessary to be shewn on the applications to extend the time transpired in the presence of the learned Judge, and the facts were within his own knowledge. There was no reason why he should not act upon that knowledge in considering the applications to extend the time.

And having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders. The learned Judge rightly exercised his discretion, upon sufficient grounds and for sufficient reasons appearing before him, and his orders should not be interfered with.

Having regard to the statute and Rules and the stage at which the applications were made, the appropriate form of the orders would seem to be to extend the time for fixing the days of trial rather than the time for the commencement of the trial. If necessary, they may be amended in that respect.

The cases will then be left to be dealt with by the rota Judges along with the other petitions on the registrar's list.

The appeals are dismissed. Costs in the petition.

E. B. B.

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[IN CHAMBERS.]

## CONFEDERATION LIFE ASSOCIATION V. MOORE.

1903

Nov. 18.

*Practice—Motion to set aside order for service out of Jurisdiction—Stay of Proceedings—Appearance.*

A notice of motion to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings, until finally disposed of, so that the time to enter an appearance does not run in the meanwhile.

THERE had been a motion herein by the defendant to set aside an order for service of the writ of summons out of the jurisdiction, on the ground of irregularity resulting, as reported 2 O.W.R. 941, in an order that upon the plaintiff filing a further and better affidavit, as he was given leave to do, the motion should be dismissed, costs to be costs in the cause, or in the alternative that the motion be dismissed with costs, upon preliminary objection taken.

The plaintiff accepted the first alternative, and an order was issued accordingly; but the defendant having failed to enter an appearance to the action, the plaintiff meanwhile signed judgment, which the defendant now moved to set aside upon the grounds stated in the judgment.

The motion was heard on November 16th, 1903, before Mr. Cartwright, the Master in Chambers.

*W. E. Middleton*, for the defendant.

*G. H. Kilmer*, for the plaintiffs.

The cases cited are referred to in the judgment.

November 18. THE MASTER IN CHAMBERS:—This case was before me and was disposed of then as appears from the report in 2 O.W.R. 941 (under date of November 4th.)

The plaintiffs accepted the first alternative and filed a further affidavit next day. On the 6th inst., an order was accordingly issued to that effect. The defendant's solicitors were not present but had been informed of what was going to be done. The defendant's motion had not asked for any stay of

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proceedings, and the time for appearance having elapsed, the plaintiffs' solicitor, after search at the central office, signed judgment in default of appearance without letting the defendant's solicitors know what he intended to do, although it appears from Mr. Nasmith's affidavit that the plaintiff's solicitors knew he intended to appear and defend. Subsequently he offered to pay the costs if allowed to defend, but this offer was refused.

The solicitor for the plaintiffs has made two affidavits. He admits what took place on November 3rd as stated by the defendant's solicitor, but does not notice the allegations in Mr. Nasmith's affidavit as to what took place on the two following days. These he neither admits or denies, though giving reasons why it is unlikely he said what Mr. Nasmith alleges.

A motion was then made by the defendant to set aside the judgment herein in default of appearance as having been irregularly entered.

It was further contended that in any case the defendant should be allowed to defend on the merits.

The motion was heard on November 16th inst.

The grounds of irregularity were three, viz. :

1. That the order of November 4th was issued *ex parte*, and that the defendant should have seen the affidavit then filed before the issue of the order.

2. That judgment was signed too soon, as the defendant had all of November 6th in which to appear.

3. That the writ was not specially endorsed.

If the second of these objections can be sustained it will be unnecessary to consider anything else.

I am of opinion that the motion must succeed on this ground for the following reasons.

I have always understood that a notice of motion operated as a stay (in a case such as the present) until finally disposed of. I have consulted several members of the profession who are most conversant with these matters. They all agree with that opinion. To the same effect are the authorities cited by Mr. Middleton—Archbold's Common Law Practice, 14th ed., p. 1406; *Wood v. Nichols* (1867), 4 P.R. 111; and *Dean v. Thompson* (1868), 4 P.R. 301; also *Farden v. Richter* (1889), 23

Q.B.D. 124, where the facts relied on are just the reverse of what took place here.

It was argued on the other side that no such stay does take place; that in any case the defendant should have appeared and have entered a conditional appearance. This, however, could not be done without an order, which would be a useless expense. Certainly, in such a case I would have refused the order as unnecessary, but have granted a stay. No such practice as above contended for has ever been followed here, whatever may be the case in England, where a defendant can enter a conditional appearance if he so desires. However that may be, it is sufficient to answer that the defendant might have considered the advisability of appealing from the order of November 4th. If he had done so, then it would not have been necessary to appear until the appeal was decided, which might not have been till some weeks later.

The case of *Smith v. Logan* (1896), 17 P.R. 219, shews that the Court will never be astute to shut out a defence. To the same effect is *Dobie v. Lemon* (1887), 12 P.R. 64. I am glad to be freed from the painful duty of deciding between the affidavits of the solicitors.

I base my judgment on the ground that the rule as evidenced by the general understanding and practice of the profession is that in a case like the present there was a stay of proceedings, which is a desirable and convenient practice, and that the entry of judgment was premature and must be set aside with costs to the defendants in any event.

I have not thought it necessary to deal with the other branches of the motion. But I formed a strong opinion that the defendants should be allowed to be let in to defend on the merits, upon the usual terms, such as were made in *Dobie v. Lemon*.

The plaintiffs were well aware that the defendant was vigorously contending that he was not liable for any such sum as the amount claimed by them.

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## [DIVISIONAL COURT.]

D. C. IN RE THE CONFEDERATION LIFE ASSOCIATION V. CLARKSON.

1903

Nov. 14.

*Will—Power to sell “or dispose”—Power to Exchange.*

A testator devised her real estate to be equally divided between her children when the youngest of them attained 21 with a power to the executor “to sell or dispose of any or all of the above real estate should he think it to the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales<sup>s</sup> :—

*Held*, that the executor had no authority to exchange the lands of the testatrix for other lands.

THIS was a motion under the Vendors and Purchasers Act, referred by agreement to a Divisional Court, and made under the circumstances stated in the judgment. It was argued on October 8th, 1903, before MEREDITH, C.J.C.P., and MACMAHON and TEETZEL, JJ.

*C. P. Smith*, for the vendor, contended that there was a right to exchange, and referred to: *Tenute v. Walsh* (1893), 24 O.R. 309; *Smith v. Spears* (1892), 22 O.R. 286; *In re Frith v. Osborne* (1876), 3 Ch. D. 618.

*M. H. Ludwig*, for the purchaser, contended that the executor had only a naked power to sell, and that the word “dispose” does not justify exchange: *Brassey v. Chalmers* (1852), 16 Bea. 223; *Armour on Titles*, 3rd ed., p. 339; *Theobald on Wills*, 5th ed., p. 394.

November 14. The judgment of the Court was delivered by MEREDITH, C.J.:—This is a motion under the Vendors and Purchasers Act in respect of an objection taken to the title by the purchaser.

The question arises upon the will of Elizabeth Trolley, dated June 6th, 1881, by which she devised her real estate to be equally divided between her children when the youngest of them attained twenty-one, with a power to the executor which is in these words:

“With full power to sell or dispose of any or all of the above real estate should he think it to the interest of my



children to do so, and, should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales."

And the question is whether, under this power, the executor had authority to exchange the lands of the testatrix for other lands.

We are of opinion that he had not. Whatever meaning might be given to the word "dispose" unconnected with the word "sell," and unexplained by the context, or the subject matter to which it relates, upon the language of this will it does not, in our opinion, include a disposition of the lands of the testatrix by exchanging them for other lands. Used as it is in connection with the word "sell," and having regard to the provision as to the executor being authorized to pay any debts standing against the real estate, and to deduct them "from such sale or sales," what was intended, we think, was a disposition by sale.

It was suggested upon the argument that the children of the testatrix had, by receiving the proceeds of the property for which the lands in question were exchanged, precluded themselves in equity from impeaching the exchange, but the evidence upon which such a conclusion could be reached was not produced, and even if it had been, the difficulty would still remain that the purchaser is not bound to accept an equitable title, the legal estate being outstanding in someone other than the vendor.

Our judgment must, therefore, be that the objection is well taken.

In addition to the cases cited in the argument, *Philps v. Harris* (1879), 101 U.S. 370, and *Winters v. McKinstry* (1902), 14 Man. 296, may be referred to.

A. H. F. L.

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Meredith, C.J.

## [DIVISIONAL COURT.]

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Nov. 2.

COOK v. DODDS.

*Executors and Administrators—Executor de son tort—Payment by—Statute of Limitations—Bills of Exchange Act—Dominion and Provincial legislation—Joint contract—R.S.O. 1897, c. 129, s. 15.*

Although a payment or acknowledgement by an executor de son tort will not displace the bar of the statute of limitations in an action against a lawful personal representative, yet where an executor de son tort had made payments of interest in respect to a promissory note, within six months before action commenced, and the holder of the note brought action against her to make her answerable to the extent of the goods of the deceased come to her hands :—

*Held*, that the defendant could not by setting up that she was a wrong-doer and not the true representative, escape the effect of the payments giving a new start to the statute, as between herself and the plaintiff. An executor de son tort must be treated as the true representative of the deceased, as respects payments made by him and their effect.

The Bills of Exchange Act does not deal with the consequences which are to flow from the character which it attaches to the promise which a bill or note contains; and, therefore, these consequences fall to be determined according to the law of the Province in which the liability is sought to be enforced.

THIS was an appeal by Ellen Dodds and Thomas Dodds, the defendants to this action, from the judgment of the senior Judge of the county court of Huron, dated April 14th, 1903, refusing their application for a new trial. The facts of the case are stated in the judgment of MEREDITH, C.J.C.P.

The appeal was argued on October 6th, 1903, before MEREDITH, C.J., and MACMAHON and TEETZEL, JJ.

*W. E. Middleton*, for the appellants, contended that an executor *de son tort* cannot by any act of his give a new start to the Statute of Limitations as against a lawful administrator, neither could the payments made by the defendant Ellen Dodds bind her personally, for this would be a promise by an executrix to answer out of her own estate, which the Statute of Frauds requires to be in writing; that to give a new start to the Statute of Limitations, a payment must be by somebody who has authority to bind the estate, and not by a stranger: *Taylor v. Hollard*, [1902] 1 K.B. 676, 681; *Bradshaw v. Widdrington*, [1902] 2 Ch. 430, 450; *Trust and Loan Co. of Canada v. Stevenson* (1892), 21 O.R. 571, 20 A.R. 66; *Buckley*

v. *Barber* (1851), 6 Exch. 164, 183; Williams on Executors, 9th ed., p. 217; and that no right of action survived against the estate of Peter Dodds: Leake on Contracts, 4th ed., p. 296; and that the power to make a joint note, which is recognized by the Bills of Exchange Act, cannot be regarded as modified by any provincial statute.

*W. Proudfoot*, K.C., for the plaintiff, contended that the defendant Ellen Dodds could not set up her own want of authority, that judgment should have been against her personally; and that the payments bound the estate so far as she was concerned: *Haacke v. Gordon* (1849), 6 U.C.R. 424; *Bain v. McIntyre* (1868), 17 C.P. 500; R.S.O. 1897, ch. 129, sec. 15.

November 2. The judgment of the Court was delivered by MEREDITH, C.J.:—The defendants were sued as executors of the estate of Peter Dodds, deceased, to recover the amount of a promissory note for \$200, dated January 10th, 1891, made by the deceased and one Thomas Dodds, payable, with interest at the rate of seven per cent. per annum, to the respondent one year after date.

The appellants filed a notice disputing the respondent's claim in full, and setting up the Statute of Limitations as a defence.

At the trial before the senior Judge on September 8th, 1902, the respondent gave evidence of acts done by the appellant Ellen Dodds, sufficient to charge her as executrix *de son tort* of the deceased Peter Dodds, and also proved that the appellant Ellen Dodds had made payments of interest on the promissory note sued on within six years before the action was begun.

Unless the payments of interest made by the appellant Ellen Dodds operated to save the respondent's right of action, her right to recover on the promissory note was admittedly barred by the Statute of Limitations.

The appellants, besides relying on the defence of the Statute of Limitations, contended that inasmuch as the promissory note was a joint one and the other maker had survived the deceased Peter Dodds, there was no right of action against the estate of the latter.

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The appellant Thomas Dodds was served with the summons by mistake, another Thomas Dodds, and not he, having been intended to be sued.

The learned Judge gave judgment in favour of the respondent on April 2nd, 1903, holding that inasmuch as Peter Dodds was the principal debtor and Thomas Dodds only a surety, the respondent was entitled to maintain her action against the personal representative of the former; that as the appellants had pleaded a denial of liability and the Statute of Limitations, on the authority of *Haacke v. Gordon*, 6 U.C.R. 424, they had admitted their representative capacity, and that the payments made by the appellant Ellen Dodds prevented the Statute of Limitations from operating to bar the remedy of the respondent on the promissory note.

The formal endorsement on the summons was that judgment should be entered for the plaintiff for \$233, and costs to be paid forthwith to be levied of the goods and chattels of the deceased, failing such goods the costs to be levied of the defendant's proper goods and chattels.

An application was made by the appellants for a new trial and the dismissal of the action, and it was disposed of by the learned Judge as shewn in the memorandum indorsed by him on the summons, which reads as follows:—

“On application for a new trial I amend my judgment and now give judgment for the plaintiff for \$223 and costs, to be paid by the defendant Ellen Dodds as executrix forthwith, to be levied of the goods and chattels of the deceased, failing such goods the costs to be levied of the defendant's proper goods and chattels.”

From that disposition of the application for a new trial the present appeal is brought.

Upon the argument before us, the objections which were urged in the Court below were again raised.

It is, I think, not open to doubt that a payment or acknowledgment by an executor *de son tort* cannot be relied on to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased.



The principle upon which a part payment has been held to give a new starting point for the running of the statute is that it is an acknowledgment from which the law raises the implication of a promise to pay the residue of it, and the rule is therefore quite inapplicable, as it seems to me, to a payment by an executor *de son tort*; such an executor is treated as an executor only for the purpose of fixing liability upon him, and his acts are good against the lawful representative of the deceased only where they are lawful and such as the true representative was bound to perform in the due course of administration: *Graysbrook v. Fox* (1771), Plowden 275, at p. 282; *Buckley v. Barber*, 6 Exch. 164, at p. 183; and even where letters of administration have been subsequently granted to him, the previous acts of an executor *de son tort* to the prejudice of the estate are not made good by the subsequent administration: *Morgan v. Thomas* (1853), 8 Exch. 302.

The opinion of Vice-Chancellor Esten, *Grant v. McDonald* (1860), 8 Gr. 468, at p. 475 (and Spragge, V.-C., though he does not in terms say so, appears to have agreed with him), and the decision of the Court of Appeals of South Carolina, in *Haselden v. Whitesides* (1847), 2 Strobbart 353, are in accordance with this view.

But granting this, it does not follow necessarily that the respondent was not entitled to recover. Neither the rights of a lawful representative of the deceased nor those of the persons beneficially entitled to the estate of the deceased are in question. All that the respondent is seeking is that the executrix *de son tort* be made answerable to her to the extent of the goods of the deceased which have come to her hands, and, as it appears to me, the considerations applicable to such a case are very different from those which are to be applied where a creditor is seeking as against the true representative or the persons beneficially entitled to the estate of the deceased to enforce his claim.

It was long ago settled that a creditor, if he finds that some one has intermeddled with the personal estate of his deceased debtor, is not bound to enquire whether that person is the lawful personal representative of the debtor, but may sue him as executor, naming him as executor generally, and on proof, if

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the executorship is denied, either of a grant of probate to the defendant or of his having intermeddled with the personal property of the deceased in such a way as to constitute him executor *de son tort*, will be entitled to recover against the defendant as executor of the debtor; and if the defendant has not pleaded *plene administravit*, or, having pleaded it, has failed upon his plea, the judgment will be for the recovery of the debt and costs to be levied of the goods and chattels of the deceased in the hands of the defendant to be administered, and if he has not so much thereof in his hands to be administered, then of his (the defendant's) own goods and chattels.

Where the defendant pleads *ne unques* executor and that plea is found against him, and, as I have said, it may be found against him though it is shewn that he is but an executor *de son tort*, it appears to me that it is not open to him for the purpose of preventing a payment made by him which, if it had been made by the lawful personal representative, would have prevented the Statute of Limitations from operating to bar the plaintiff's claim from having that effect, to rely upon his having been a wrong-doer and not the true personal representative; in other words, that as between him and the plaintiff, as respects the payments made by him and their effect, he must be treated as the true representative of the deceased.

If the creditor may for the recovery of his debt proceed against him as the true personal representative of the deceased in order to reach the personal estate of the deceased which has come to his hands, why may he not for the same purpose treat him as the true representative in making the payment on account of his claim against the deceased?

As I have already pointed out in *Grant v. McDonald*, and in the South Carolina case, the true representative was sought to be made liable, and in the latter case Withers, J., who delivered the judgment of the Court, pointed out that their decision had nothing to do with actions instituted against executors *de son tort* as such.

The result of giving effect to the contention of the appellants would be an injustice to the respondent, who, no doubt, refrained from bringing her action within the six years because

of the payments which were made to her by one who assumed to be, and whom she was entitled to treat as, the executrix of the estate of the deceased, and I see no reason why the payments made by the appellant Ellen Dodds should not, as against her and for the purpose of enabling the respondent to reach the goods of the deceased which have come to her hands, be treated as having been made by the legal personal representative of the deceased, the character which the appellant Ellen Dodds assumed, and, as the respondent had the right to think, rightly assumed.

The objection based upon the promissory note being a joint one is not, in my opinion, entitled to prevail. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or promissory note contains, whether that of a joint or joint and several liability. These consequences, in my opinion, fall to be determined according to the law of the Province in which the liability is sought to be enforced, and inasmuch as in this Province the common law rule as to joint contracts has been superseded by statutory enactment, R.S.O. 1897, ch. 129, sec. 15, the provisions of the latter are to govern in determining the right of the respondent to sue in this Province.

Judgment seems to have been given against the appellant Thomas Dodds, *per incuriam*, as he was under no liability to the respondent and ought not to have been given against the Thomas Dodds intended to have been sued, as he was never brought before the Court.

Upon the whole, I am of opinion that the judgment should be varied by adding after the words "goods and chattels of the deceased" the words "in her hands to be administered," and by substituting for the word "defendants" before the word "proper" the words "defendant Ellen Dodds," and by dismissing the action as against the appellant Thomas Dodds, and with that variation should be affirmed and the appeal dismissed without costs.

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[IN CHAMBERS.]

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RE WAY.

Dec. 5.

*Will—Construction—Residuary Bequest—"Personal Effects"—Mortgage—Debts and Expenses of Administration—Ratable Charge on Real and Personal Estate.*

A will was in part as follows: "My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate, real and personal, which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows I give devise and bequeath absolutely to my beloved wife . . . all my furniture books plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children.

The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate:—

*Held*, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things *ejusdem generis* with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate.

*Held*, also, following *Re Thomas* (1901), 2 O.L.R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values: Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 7.

MOTION under Rule 938 for order declaring construction of will and giving directions to executors.

James Way, who died on the 15th February, 1893, by his will dated the 10th January, 1876, devised as follows: My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows I give devise and bequeath absolutely to my beloved wife Jane Elizabeth Way all my furniture books plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live if she marries again she shall have one



third of the rents so long as she may live and my daughter Eliza Devonia Way being unmarried shall have the full use and benefit of two thirds of the rents or net proceeds of the real estate until she marries or dies in the event of her marriage or death and my said wife being living but married again then the two thirds aforesaid shall be from time to time equally divided among my children in Canada until the death of my wife. In the event of the death of my wife previous to the marriage or death of my daughter Eliza Devonia Way then she the said Eliza shall have the full use and benefit of the whole of the rents or net proceeds of my said real estate until she marries again. As soon as may be convenient after the death of my wife and the death or marriage of my said daughter the property shall be sold and the proceeds divided (among children and grandchildren). Lastly I nominate and appoint John E. Way Samuel Robins and Samuel O. Maddocks together with my wife Jane Elizabeth Way executor and executrix of this my last will and testament.

Probate of the will was granted to the executors and executrix therein named.

The testator left him surviving his widow and five daughters, viz., Sarah Jane Way, wife of the said John E. Way; Eliza Devonia Doyle, of Chicago, U.S., married woman; Harriet Ann Maddocks, wife of the said Samuel O. Maddocks; Louisa Maria Robins, wife of the said Samuel Robins; and Margaret Elizabeth Prust, of Hortland, Devon, England, married woman. The daughters were still living. The widow died on the 14th November, 1902, having made a will in favour of her daughter the said Sarah Jane Way, the construction of which was not now in question.

The estate of James Way, deceased, at the time of his death, consisted of household furniture and chattels valued at \$250; policy of life insurance, \$150; two parcels of real estate in Hamilton valued at \$2,400; and a mortgage on real estate in Hamilton dated the 14th August, 1875, made by the said John E. Way and (for the purpose of barring dower) his wife, the said Sarah Jane Way, to secure the sum of \$600 and interest as therein mentioned.

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The testator's debts and funeral expenses and the expenses attending the execution and probate of his will had been paid out of the insurance money, but the real estate of the testator had not been sold nor had the executors received any remuneration.

The testator's daughter Louisa Mary Robins contended that the mortgage in question did not pass under the above mentioned bequest in his will to his widow, and also that it was liable in priority to the real estate to the payment of all his debts, funeral expenses, and expenses attending on the execution of his will and the administration of his estate.

The daughter Sarah Jane Way contended that her late mother, the said Jane Elizabeth Way, took the beneficial interest in the said mortgage under the said bequest. Sarah Jane Way also claimed the said mortgage as passing to her under the terms of her mother's will, but this claim, though not abandoned, was not argued, and was withdrawn from consideration on the present motion.

The motion was heard by OSLER, J.A., sitting in Chambers for a Judge of the High Court, on the 13th November, 1903.

*D'Arcy Tate*, for the executors Samuel O. Maddocks and John E. Way and for Sarah Jane Way.

*J. Dickson*, for the executor Samuel Robins and for Louisa Maria Robins.

December 5. OSLER, J.A. (after stating the facts as above):—The first question submitted is whether the mortgage of the 14th August, 1875, and the beneficial interest therein passed to the testator's widow Jane Elizabeth Way under the bequest to her in the said will of "*all my furniture, books, plate, and other personal effects.*"

The cases which have been decided upon wills containing words like these or of like import are in a general way of speaking innumerable, and many of them, as my learned brother Britton said in *Re McMillan* (1902), 4 O.L.R. 415, are "conflicting, and there are subtle distinctions difficult to follow." When they are found in a residuary bequest that is usually a controlling circumstance: Roper on Legacies, 2nd Am. from 4th

London ed., pp. 279, 280 ; Theobald on Wills, 5th ed., p. 180. And in interpreting such words "the disposition of the Judges of the present day is to adhere to the rule which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense:" Jarman on Wills, 5th ed., pp. 712, 715.

In the case before me I am of opinion that the beneficial interest in the mortgage passed to the widow. Taking the whole clause in which the bequest of the personalty is found, it is in express terms a gift of the residue (Williams on Executors, 9th ed., vol. 2, p. 1317), and, if the words "other personal effects" are not cut down by the words which precede them, they are wide enough, having regard to the large meaning of the word "effects" (Roper on Legacies, supra, Am. & Eng. Encyc. of Law, 2nd ed., vol. 10, p. 448), to include a mortgage or other chose in action. Then, are they restricted by the preceding words to things *ejusdem generis* with property which those words describe? If the gift were not in terms or in effect residuary, and the will contained other dispositions of portions of the personal estate there might be room to infer that the testator was not using the general words in their more comprehensive sense. As it is, he shews that his intention was to dispose of the whole of his personal estate (of which at the date of his will the mortgage formed part), and unless the words he has used were given their larger meaning his intention would be frustrated, and part of the residue would remain undisposed of, a result which is always if possible to be avoided, and which nothing in this will invites me to arrive at. I refer to *Hodgson v. Jex* (1876), 2 Ch. D. 122; *In the goods of Jupp*, [1891] P. 300; *In the goods of Shephard* (1879), 48 L. J. N. S. P. D. 62; *King v. George* (1876), 4 Ch. D. 435; *Dunally v. Dunally* (1857), 6 Ir. Ch. 540.

The second question is whether the mortgage or mortgage debt is liable in priority to the real estate of the said James Way, deceased, for the payment of all his debts and funeral expenses, and the expenses attending the execution of his will and the administration of his estate.

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The whole of the property of the deceased being charged by his will with these debts and expenses, and the bequests and devises to the widow and others being residuary, this question is answered, as to debts at all events, by the 7th section of the Devolution of Estates Act, R.S.O. 1897, ch. 127, which enacts that the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts. As to funeral and other expenses, although the section is silent as to these, it appears to me that the result ought to be the same, and that I should follow without further discussion the view expressed by the learned Chancellor in *Re Thomas* (1901), 2 O.L.R. 660, 664, that "the estate as a whole should defray these charges and expenses," and that "there should be ratable apportionment and distribution of the expenses according to the respective values of the real and personal estate."

The first question submitted is therefore answered in the affirmative; and the second as stated in the negative.

T. T. R.



[IN THE COURT OF APPEAL.]

## RANDALL V. OTTAWA ELECTRIC COMPANY.

C. A.

1903

*Negligence—Accident—Live Electric Wire—Contact with—Trespasser on Pole—  
Privity of Contract—Contributory Negligence.*

Feb. 18.

Nov. 4.

The defendants, electrical engineers, had contracted to illuminate certain buildings and for such purpose had arranged with an electric company for the supply of electric current. To enable such current to be transmitted, the defendants had strung wires on an existing telegraph pole, belonging to another company, their wires being some distance below the other wires, and fastened to glass insulators with tie wire, the ends of which were some two or three inches long unprotected by insulating covering. The plaintiff and two other employees of the electric company were engaged in putting up for the company, on the same pole but without any license or authority from the owner, an electric transformer for the transmission of electricity to adjacent premises, as to which the defendants were in no way interested, and while working on the pole the plaintiff's hands came into contact with one of the ends of the tie wire, which, by reason of the absence of insulating covering, had become a live wire, whereby the plaintiff received a shock and fell to the ground and was injured. The plaintiff knew the dangerous character of the work and the likelihood of there being live wires, and that the rule of his employers in such cases was that rubber gloves should be worn by him :—

*Held*, that no negligence on the defendants' part was proved, for no duty was cast upon them with regard to the plaintiff, who was not their employee, and the work which was being done was not on their behalf; and that even if negligence on the defendant's part could be assumed, the plaintiff was guilty of such contributory negligence as would preclude his recovering.

THIS was an appeal by the defendants Ahearn and Soper, Limited, from the judgment of the Divisional Court dismissing a motion to enter a nonsuit or judgment for the defendants after the disagreement and discharge of the jury at the trial.

The statement of claim alleged that the plaintiff was a line-man in the employment of the Ottawa Electric Company. On the 29th September, 1901, he was sent by his employers to do some work on a pole carrying their wires on the south side of Wellington street; and while engaged in doing this work his person or clothing came into contact with some live wires which had been negligently and carelessly fixed to the pole by the defendants, by reason whereof he was thrown to the ground, and severely and permanently injured.

That the defendants had the contract for supplying light for the Government and other buildings for the purpose of illumination during the visit of H.R.H. the Prince of Wales to Ottawa in September, 1901, and had strung wires along Wel-

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lington street and connected same to the pole where the plaintiff was working in such a careless and negligent way as to cause said injuries to the plaintiff.

That such negligence consisted in, (a) placing these wires on the centre of the pole where the plaintiff was obliged to stand when working, instead of on the arms; (b) omitting to properly cover the tie wire which held the said wires in place on the pole, so as to prevent the same from becoming a live end; (c) allowing the ends of the tie to be left about a foot long, instead of being cut off close to the pole so as to prevent the ends from coming into contact with the person or clothing of a workman employed on the pole; (d) turning, or causing the electric current to be turned on, without notice or warning to him, when, by reason of the negligent condition in which said wires were left, the plaintiff fell and was injured.

The plaintiff further alleged that defendants knew, or might have known, that other electric and telephone companies had their wires attached to the pole, and that their workmen would have occasion to work thereon; and knew, or should have known, that the wires placed by the defendants were so dangerously and improperly constructed as to be dangerous to any one working on the pole, and the plaintiff was injured by the defendants' want of proper care and caution in this respect.

By their statement of defence the defendants denied the negligence charged, and all negligence; and alleged that the plaintiff was a trespasser who had climbed the pole from which he fell without any authority or right to do so, and that the accident was the result of such trespass, and of his own negligence and want of care while employed in a dangerous occupation, the risks and perils of which he was well acquainted with and voluntarily undertook.

On September 26 and 27, 1902, the case was tried at Ottawa before Meredith, J., and a jury, to whom the following questions were submitted by the learned Judge:

1. Was any negligence of the defendants the approximate cause of plaintiff's injury?

The jury answered this question, "Yes."

2. If so, what was such negligence?

Answer, "By using uncovered tie wires, and careless construction of tie wires."

3. Might the plaintiff by the exercise of ordinary care have avoided the injury?

The jury did not answer this question.

The plaintiff then moved for judgment on the answers.

The learned Judge declined to enter judgment, treating the case as one in which the jury had not agreed, in consequence of their failure to answer the third question, and dismissed the motion with costs.

The plaintiff then appealed to the Divisional Court (MEREDITH, C.J., and MACMAHON, J.) to have the judgment entered in his favour on the findings of the jury. The defendants also moved to enter judgment for themselves, on the ground that there was no evidence of negligence on their part proper to have been submitted to the jury; and that the plaintiff's injury was caused by his own want of care, etc.

The motions were argued on the 30th day of November, 1902.

*H. M. Mowat*, K.C., and *A. E. Fripp*, for the appellants.

*Wallace Nesbitt*, K.C., and *Charles Murphy*, for the respondents and for the cross appeal.

February 18. MEREDITH, C.J.:—This was a motion by the defendants Ahearn and Soper, Limited, for judgment dismissing the action, and by the plaintiff for judgment in his favour on the findings of the jury.

The action was tried before Meredith, J., with a jury, at Ottawa, on the 26th and 27th September, 1902, and the jury were required to answer certain questions submitted to them by the trial Judge, all of which they answered in favour of the plaintiff, except one, as to plaintiff's contributory negligence, which they did not answer.

The learned trial Judge treated what occurred as a disagreement of the jury and discharged them; and this, we think, was the proper course.

It appears from the testimony given at the trial that the pole which the Ottawa Company and the plaintiff, as its

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servant, were using, and to which the wires of the Ahearn Company, from the current on which the plaintiff's injuries were alleged by him to have been caused, were attached, belonged either to the Great Northwestern Telegraph Company or to the Bell Telephone Company, but it does not appear clearly whether the Ottawa Company and the plaintiff were mere trespassers in using the pole, or were using it with the consent of the company to which it belonged, though I think, having regard to all the circumstances and the nature of the work that was being done, it is not the proper, or, at all events, the necessary inference, that the plaintiff and his employers were mere trespassers or even mere licensees. The transformer which the plaintiff had been engaged in putting up, the appliances for raising which he was taking down when he was injured, as I understand the testimony, was put up by the Ottawa Company under their contract with the Ahearn Company to supply the electric current for the line which the latter company had put up, and whatever may have been the position of the plaintiff, as between him and the owner of the pole, and as between him and the Ahearn Company, it must, I think, be taken that he was using the pole under circumstances that made the duty of the Ahearn Company towards him as great, at least, as it would have been had the plaintiff been an employee of the owner of the pole, and had been engaged in doing the work upon which he was engaged for that owner.

The standard for measuring the duty which the Ahearn Company owed to the plaintiff in the circumstances of this case is not the same standard as that which would have been applicable if the line, the current from which, as it is alleged, caused the injury to the plaintiff, belonged to his employers, and the action had been against the employers; but the duty which was owed by the Ahearn Company to the plaintiff was to take reasonable care that he should not suffer injury from the dangerous current of electricity which they were conducting on their line in close proximity to the place where he was working: *Thrussell v. Handyside* (1888), 20 Q.B.D. 359; *Carr v. Manchester Electric Co.* (1900), 7 Am. Electrical Cas. 746.



Negligence was said by Mr. Justice Willes to be "absence of care according to the circumstances," from which it follows that the greater the danger the greater the care which it is incumbent on the person bringing into existence or use the source of danger to exercise in order to avoid injury to any other person to whom he owes the duty not to be negligent.

It was, I think, on the evidence in this case, for the jury to say whether there was that "absence of care according to the circumstances," having regard on the one hand to the highly dangerous character of the element which the Ahearn Company was dealing with and the means that were open to it for avoiding altogether, or at least of reducing to the least possible minimum the danger, and on the other hand to the obvious and ordinary means of protection and of avoiding injury that was available to the plaintiff in the circumstances and under the conditions attending the performance of the work which he was doing.

The circumstance that bare wires were used for tie wires was apparent to the eye, and the circumstance that the plaintiff was not wearing gloves when he was engaged in the work was not, I think, sufficient to justify the withdrawal of the case from the jury, however cogent they might be as reasons for the jury coming to the conclusion either that negligence on the part of the Ahearn Company had not been proved, or that the plaintiff was guilty of contributory negligence: *Paine v. Electric* (1901), 7 Am. Electrical Cas. 651.

Upon the whole, I think that neither the motion of the Ahearn Company to enter judgment dismissing the action, nor that of the plaintiff to enter judgment in his favour on the findings of the jury, should prevail, but that a new trial should be directed and the costs of both appeals, and of the last trial, should be costs in the cause to the party who is ultimately successful, unless the Judge before whom the action is tried otherwise directs.

The defendants subsequently moved for and obtained leave to appeal to the Court of Appeal from the judgment of the Divisional Court on the terms mentioned in the judgment by which leave was granted, one of which was, that for the purposes of the appeal, and of the action, the third question submitted

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to the jury was to be taken as having been answered in the negative.

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On October 5th, 1903, the appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

*W. R. Riddell*, K.C., and *Charles Murphy*, for the appellants. There is no evidence of negligence on the part of the defendants. There is nothing to shew that the plaintiff had any right to have been working on the pole which did not belong to the defendants, but to the Great North Western Telegraph Co., and the plaintiff, therefore, in using the pole was a mere trespasser. Even if the plaintiff can be assumed to have been using the pole under instructions from the defendants, they would only be liable for some defect or danger, which the plaintiff was not aware of, and of which it was necessary to caution him. Here the plaintiff knew perfectly well what might be the condition of the wires; that there might be a live wire. In such case it was his duty to wear rubber gloves, and, but for the neglect to do so, the accident would not have happened. The evidence shewed that where there are a number of wires strung on the same pole with the ends of some hanging loose, it is always a question of doubt, whether there may not be a contact somewhere so as to cause a wire to become a live wire. The defendants were not dealing with the general public, but with a particular type of person, namely, an employee, who knew what the danger was, and of the way to obviate it, namely, by the use of the rubber gloves, and by the rules of the company under whom he was working he was directed in such case to wear rubber gloves. There was, therefore, such contributory negligence on the plaintiff's part as prevented his recovering; *Phillips v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 28; *Callender v. Carlton Iron Co. Ltd.* (1893), 9 Times L.R. 646; (1894), 10 Times L.R. 366; *Thomas v. Quartermaine* (1887), 18 Q.B.D. 865; *Spence v. Grand Trunk R.W. Co.* (1896), 27 O.R. 303; *Junior v. Missouri Electric Light and Power Co.* (1895), 5 Am. Electrical Cas., 369.

*H. M. Mowat*, K.C., and *A. E. Fripp*, for the respondent. The appeal can only be sustained on the conclusion being reached

that, as regards negligence, there was no evidence to submit to the jury; and, as to contributory negligence, on the assumption that the miscarriage on this point must be disregarded. There was ample evidence of negligence to submit to the jury, and the findings of the jury in such case will not be interfered with: *Dublin, Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155; *Metropolitan R.W. Co. v. Jackson* (1877), 3 App. Cas. 193. The evidence negatives the fact of the plaintiff being a trespasser. It is apparent from the evidence that the pole was used with the tacit consent of all parties interested, the object being to avoid multiplicity of poles, to which municipalities strongly object: *Illingsworth v. Boston Electric Light Co.* (1894), 161 Mass. 580. The plaintiff, when he climbed the pole, was told that there were no live wires, and he naturally assumed such to be the case, especially as the wires were for illuminating purposes, and would necessarily be only used at night. The evidence shewed that the rubber gloves were only used when it was anticipated that there were live wires, and, therefore, the plaintiff should have been notified that there was a live wire. It was also the duty of the defendants, as they knew the pole was used by the employees of several companies, to see that the greatest care was exercised to prevent any accident happening, and this could have been done by insulating the ends of the wire by covering them with gutta percha: *Royal Electric Co. v. Heve* (1902), 32 S.C.R. 462. Even if the plaintiff disobeyed orders in not wearing gloves, the order was one made by the Ottawa Electric Company and not by the defendants, and there was no privity between them, so that the defendants cannot avail themselves of such order. Whether gloves should or should not have been used was, under the circumstances, a question for the jury: *Mitchell v. Raleigh Electric Light Co.* 7 Am. Electrical Cas. 644; *Griffin v. United Electric Light Co.* (1895), 164 Mass. 492.

November 4. The judgment of the Court was delivered by OSLER, J.A. [who, after setting out the facts as in the statement herein, proceeded]:—The facts lie in a small compass. The defendants, who are electrical contractors and engineers, contracted with the Government to light the Govern-

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ment buildings on the occasion of the visit of the Duke of York to Ottawa in September, 1901, and they arranged with the Ottawa Electric Company to supply them with the necessary power. For the purposes of their contract the defendants carried two wires along Wellington street and connected them with the equipment in the departmental block. At the southwest corner of Wellington and O'Connor streets there are two poles between six and seven feet apart, one belonging to the Great Northwestern Telegraph Co., the other to the Ottawa Electric Light Company. The former carried telegraph and telephone wires only, and on it, at a considerable distance below these wires, and about 29 or 30 feet from the ground, the defendants placed their wires, which were about 13 inches apart, and were attached to the usual glass insulators on the ends of small side blocks or wooden projections nailed diagonally to the pole. The wires were tied or fastened to these insulators by common wire which was not itself protected by any insulating covering. The projecting ends of the tie wire were two or three inches long. The defendant Soper said that their wires were put up with the knowledge of the telegraph company, but could not be sure if their permission had first been asked or not. These two wires were the only ones on that pole carrying the electric current, the only live or dangerous wires, and they were intended to be and were taken down as soon as the defendants' contract had been carried out. About 24 feet from the ground there was fastened to the pole a cross arm, whether put there by the defendants' men or by the telegraph company does not appear. Shortly after the defendants' wires had been put up, the Ottawa Electric Company, in the course of their own business, sent three of their men, one of whom was the plaintiff, to put up a transformer for the purpose of carrying a current for electric lighting into Victoria Chambers or some adjacent building on Wellington street. The evidence leaves it to be inferred that this was put up in some way on the Great Northwestern Telegraph Company's pole, but there is no detail of the manner in which it was accomplished or how the connection with Victoria Chambers was made, except that the transformer was hoisted up by means of a block and tackle tied to the Great North-



western Telegraph pole, about five feet above the cross arm. Having served its purpose, the tackle was being taken down, and the plaintiff was standing on the cross arm engaged in untying the rope when in some way he received a shock which threw him to the ground, and caused the injuries he complains of. There was evidence that wire used for fastening the live wires to the glass insulators should be insulated, as there is danger that the bare wire, if tied too tightly about the latter wires, might cut through or diminish the resisting power of their insulating covering, and there was also evidence that the better and safer practice was not to have the ends of the tie wires so long lest they should catch upon the hands or clothes of persons working among the wires. From the evidence it might also be inferred that the plaintiff received the shock from his hands having come into contact with the ends of the tie wires, or one of them and a guy wire which would become live or dangerous wires if the insulating material of the others had become injured or ineffective by reason of the tie wires having been tied or wound about them too tightly.

For the defendants it was contended that they owed no duty to the workmen of the Electric Light Company, as that company had a pole of their own, and the defendants had no reason to suppose that their men would be working among wires put up by them on the telegraph company's pole. As to this, one of the plaintiff's fellow workmen said that they had been merely told to go and put up the transformer, but had not been told on which pole to place it. Dion, the superintendent of the Electric Light Company, was unable to say that his company had any authority to use the telegraph pole. He said that their own pole could have been used; that there was no choice between them, one was as good for the purpose as the other. He suggested that the reason why their own pole had not been used was that there was an arc lamp on it, meaning, perhaps, that this would make it less convenient for the purpose of hoisting the block and tackle. As to the plaintiff's own negligence, it was urged that if he had stood on the other arm of the cross-bar he could not have come into contact with the tie wires which were on the opposite side of the pole, and, which is more important, that as he must have known, from the very

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nature of the operation he was engaged in, that these two wires put up by the defendants were or might be dangerous or live wires, he ought to have used the ordinary protection which by his agreement with his own employers he is strictly required to use, viz., the india rubber gloves which were supplied to him and others for the purpose. The evidence was that the plaintiff was not using the gloves. Dion said that it was very unlikely that the accident could have happened if he had done so; and Demers said that he and the plaintiff had been working together as linemen for nearly a year; that he knew the work fairly well; that the gloves were supplied for the purpose of working on the wires; that the men were instructed not to take any risk in touching even insulated wires, in case there should be a leak. One of the company's rules, he said, was that the linemen were to treat every wire as if it might be a live wire, as even a dead wire might become a live wire at any time if it was crossed by a live wire at any distance away.

The questions which arise upon this state of facts are, whether in respect of the way in which the defendants put up their wire they owed any duty to a person in the situation of the plaintiff, the servant of other employers who had, so far as it appears, no authority to use the Great Northwestern Telegraph Company pole for the purposes of their business; (2) if there was any such duty, whether it was different in any respect from that of his own employers, having regard to the plaintiff's obligation towards them to use the ordinary means of protection against danger; and (3) whether the plaintiff is not to be regarded as the author of his own injury by reason of his failure to employ them.

The case appears to me to turn substantially on the first question.

If the transformer had been put up by the Ottawa Electric Company under their contracts with the defendants in order to supply the power to their wires, as the judgment below assumes, there would be no difficulty in affirming the existence of a duty towards the workmen of the electric company to take care that their wires were put up in a safe and careful manner. There is some evidence of the assent of the telegraph company to the temporary user by the defendants of the pole of that

company for the purposes of their contract, and this might well be taken to imply assent to the doing of whatever was necessary to be done by any one in order to make the wires effective. In that case the plaintiff would, as regards the defendants, have been lawfully working on the pole, and their duty would be to take care that their wires were in a reasonably safe condition for a person in his situation, engaged upon an employment in which they were interested. It is, however, stated in the reasons of appeal, and was again urged before us and not denied, that there is a misapprehension in the judgment on this point, and that the putting up of the transformer had nothing to do with the defendants' business. It was put up by the Ottawa Electric Company solely in connection with their own business arrangements for supplying light to Victoria Chambers. This, indeed, was stated by counsel for the plaintiff in opening the case to the jury, and there is, in fact, nothing to connect the work which the plaintiff was doing with the defendants.

On this state of facts it appears to me that the plaintiff has failed to prove any negligence on the defendants' part towards the workmen of the Electric Light Company, or the breach of any legal duty owed by them to persons in the situation of the plaintiff. The light company had its own pole, which ought to have been used by their workmen, but these, for their own convenience as it must be assumed, and, at all events, without any permission from the telegraph company, chose to use and work upon the pole of that company among the wires which the defendants had placed upon it. As regards the defendants, I think the plaintiff was a mere volunteer—a person on the pole without any license or authority—and, apart from any question of his own negligence, he took the risk of these wires being out of order or imperfectly insulated. He cannot be said to have been invited by the defendants to use the pole, or to have had the license or permission of its owner to do so. The wires put up by the defendants were their own wires, put up for a temporary purpose of their own, and they had no reason to anticipate that the workmen of the Electric Light Company would be employed upon the pole. I refer to the cases of *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, (1867), 2 C.P.

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But even if it could be inferred that the plaintiff, as a workman of the Electric Light Company, was upon the pole in the character of a licensee, or that the defendants had reason to suppose that such a person would be making use of their wires, or of the telegraph company's pole, I should be of opinion that the plaintiff is shewn by the evidence to be the author of his own wrong—to have brought his injury on his own head by the omission to employ the usual means of protection against danger from electric shock. The possibility of danger was well known to him. His obligation to his own employers, and the instructions which, as regards them, he was bound to observe when working among or near wires, are proper to be considered as regards both his appreciation of danger therefrom and the means he had in his power of avoiding it. The unfortunate man seems to have been as reckless as his fellow workman in working among the wires without his gloves. I can see no reason suggested in the evidence as a possible excuse for his having done so, or for saying that his injury was not attributable directly and proximately to that, rather than to any negligence on the part of the defendants. The cases of *Paine v. Electric Co.*, 7 Am. Electrical Cas., 651; and *Carr v. Manchester Electric Co.*, Ib. 746, are quite different in their facts from the case at bar, and the evidence there was such as properly to reduce the omission of the workman to wear the gloves to one of contributory negligence for the consideration of the jury. On the whole I think the appeal should be allowed, and the action dismissed.

G. F. H.



[MACLENNAN, J.A.]

## RE VOTERS' LISTS.

## TOWNSHIP OF RAWDON, NORTH HASTINGS.

1903

Nov. 30.

*Parliament—Voters' Lists—Notice to strike off names—Non-compliance with form—Amendment.*

It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, R.S.O., 1897, ch. 7, for objections to the names wrongly inserted on the Voters' List should be followed with exactness, all that is required being that the nature of the objections to the names should be stated with reasonable clearness.

Where, therefore, in giving notice of the wrong insertion of names placed on the Voters' List, the complainant used list No. 2 of form 6 in the schedule, being the list for persons wrongly *named*, instead of list No. 3, being the list of those wrongly *inserted* on the Voters' List, but it was quite apparent what the grounds of the objections were, the notice was held sufficient.

An amendment in such case might be made if necessary.

This was a reference to MACLENNAN, J.A., one of the Judges of the Court of Appeal, under sec. 38 of the Ontario Voters' Lists Act, R.S.O. 1897, ch. 7, upon a case stated by the junior Judge of the county court of the county of Hastings.

The case was argued on November 28, 1903.

*R. A. Grant*, for Robert Totten, the complainant.

No one contra.

November 30. MACLENNAN, J.A.:—One Robert Totten, a duly qualified voter, filed with the clerk of the municipality six several notices of complaint, one in respect of voters in each of the several polling subdivisions of the said township, for that purpose in each case using the form "No. 6" prescribed by sec. 17.(1) of the Act.

In each of his notices the complainant made the mistake of placing in list No. 2 of the form, which is intended for cases of misnomer only, names of persons which should have been placed in list No. 3, as being persons whose names should, for various reasons, not have been inserted in the voters' list at all. It was conceded that all the names placed in list No. 2 are the true names of the parties, and there are no cases of misnomer. The ground of objection is stated opposite each name,

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most of them being by reason of non-residence, absence from the municipality or electoral division, or not being of age.

There are a number of names properly placed in list No. 3, objected to on similar grounds to those specified in list No. 2.

The notice, signed by the complainant, referring to the several lists of names, is "that the several persons whose names are mentioned in the first column of the subjoined list No. 2, are wrongly stated in the said voters' list as shewn in said list No. 2," and "that the several persons whose names are set forth in the first column of the subjoined list No. 3 are wrongfully inserted in the said voters' list as shewn in said list No. 3."

The printed heading of list No. 2 is "List No. 2 shewing Voters wrongly named in Voters' List," and that of No. 3: "List No. 3 shewing persons wrongfully inserted in the Voters' List."

It was objected before the learned Judge that none of the names in list No. 2 could be removed from the list inasmuch as there was no error in any of the names, and that the time for appealing having elapsed no amendment of the notice could be allowed which would have the effect of disfranchisement. On the other hand it was contended that the grounds of objection being specified in each case the notice was sufficient, or at all events might be amended.

The questions referred to by the learned Judge on these facts are whether the notice was sufficient to entitle the complainant to prove his objections, and if not whether it might not be amended.

By section 32 of the Act it is declared that: "The Judge shall have power to amend any notice or other proceeding upon such terms as he may think proper."

It seems to have been contended before the learned Judge that, inasmuch as the effect of an amendment whereby the names in question, or any of them, should be struck off the voters' list would be to *disfranchise voters*, it ought not to be allowed, for it would in effect be filing a new complaint after the time for complaining had elapsed. But it is to be observed that the enquiry before the Judge is not whether any voter is to be disfranchised, but whether certain persons are or are not entitled by law to vote, or to exercise the franchise. If persons

not entitled to vote are left on the list, that is a most serious wrong done to all who are so entitled, and if the names of such persons are stricken off they suffer no wrong.

There is, therefore, in my opinion, no ground on which a notice of objection, such as that in question, should not be amended by the Judge as freely as any other notice. Neither can it be an objection to an amendment that the time limited by the Act for serving a notice of objection had elapsed, inasmuch as the matter cannot come before the Judge at all until after that time.

I am therefore of opinion that the learned Judge might have amended the notice, if he thought any amendment necessary.

But I am of opinion that in this particular case no amendment was necessary.

Although the names were not placed in the proper list, as intended by the statute, no one could be misled by that, inasmuch as the objection to each name is distinctly specified and set forth opposite to each name, and the complaint is that the names in the list No. 2 are wrongly stated on the voters' list, *as shewn in said list No. 2*. The forms prescribed by the Act need not be followed with exactness. What the Act, sec. 4, declares is, that the forms set forth in the schedule, or forms to the like effect, shall be deemed sufficient for the purposes mentioned in the schedule. So long as the nature of the objection to any particular name on the list is made reasonably clear by the notice, that, in my opinion, is sufficient, even if the form in the schedule to the Act be not followed at all.

The complaints should, therefore, be referred back to the learned Judge to be heard and disposed of according to law.

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[IN CHAMBERS.]

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FITZGERALD V. WALLACE.

Nov. 26.

*Security for Costs—Increase—Appeal to Court of Appeal—Application for—  
Con. Rules 826, 827 and 830.*

An application for increased security for costs on an appeal from the High Court must be made to the Court of Appeal or a Judge thereof.  
*Centaur Cycle Co. v. Hill* (No. 2) (1902), 4 O.L.R. 493, followed.

MOTION by the adult defendants for increased security for costs on an appeal from the judgment at the trial to the Court of Appeal.

The motion was argued before Mr. Cartwright, the Master in Chambers, on the 25th of November, 1903.

*Dyce Saunders*, for the motion.

*F. W. Harcourt*, for the infant defendants.

*H. E. Rose*, for the plaintiff.

November 26. THE MASTER IN CHAMBERS:—The action was dismissed without costs. The plaintiff has appealed to the Court of Appeal. The case has been set down and \$200 paid into Court as security.

Mr. Rose objected that the motion could only be made to the Court of Appeal or a Judge thereof. I think this objection is entitled to prevail. Rule 830 (sub-sec. 8) was relied on for the motion. But it seems clear that all the provisions of that rule are to be governed by the first line, which says: "Where security is required under rules 826 or 827." Now both of those rules confer jurisdiction only on the Judges of the Court of Appeal.

No such application, so far as I am aware, has ever been made, otherwise than as was done in *Centaur Cycle Co. v. Hill* (No. 2) (1902), 4 O.L.R. 493.

I am informed by one of the counsel in that case that the question whether the application was rightly made to a Judge of the Court of Appeal was fully considered and decided affirmatively. The motion must be dismissed with costs to the plaintiff in any event.

This will not prejudice the renewal of the application as was done in *Centaur v. Hill*.

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[IN CHAMBERS.]

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Nov. 26.

## THE INDUSTRIAL EXHIBITION ASSOCIATION OF TORONTO.

*Pleading—Statement of Claim—Action for Damages—Dangerous Machine—Insurance Agent—Striking out Allegation.*

In an action for damages caused by a defect in a machine belonging to the defendants, an allegation in the statement of claim that the defendants were insured in an insurance company against such accidents, was struck out as immaterial, and as embarrassing to the defendants.

MOTION to strike out a paragraph of the statement of claim as embarrassing to the defendant and not relevant to the issues to be tried in the action.

The motion was argued before Mr. Cartwright, the Master in Chambers, on the 25th November, 1903.

*Goldwin L. Smith*, for the motion.

*W. N. Ferguson*, contra.

November 26. THE MASTER IN CHAMBERS:—The statement of claim alleges that the infant plaintiff was injured at the Dominion Exhibition in September last, while riding in “a machine known as a Razzle Dazzle.” The accident is alleged to have been the result of improper and defective construction of such machine. The 8th paragraph alleges that the defendant knew that the machine was dangerous.

The defendant moved to strike out the last (the 9th) paragraph of the statement of claim, which repeats the allegation of the 8th paragraph and concludes with an allegation that the defendant “to protect itself against the liability . . . insured itself against the risk it so took in the Ontario Accident Insurance Company, which company is defending this action in the name of the defendant.”

The motion must prevail and the objectionable paragraph be stricken out. The only object it can have is to prejudice the jury on the trial of the case. Whether the defendants have

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so protected themselves from possible liability or not, is not in any way relevant to the issues. The fact cannot assist the plaintiff. It certainly should not be allowed to embarrass the defendants. The fact of such insurance could not, in my opinion, be given in evidence. But if the statement is allowed to remain on the record, then it might be read to the jury and a discussion would ensue, in which the fact of such insurance would be made known to the manifest prejudice of the Association. It was stated on the argument that a new trial had been ordered in a case where counsel for the plaintiff had made a similar statement in addressing the jury. But no reference was available at the time, though counsel promised to bring it to my notice later.

I base my decision on the ground that this fact, if true, is not one of the material facts upon which the party pleading relies: see Con. Rule 268. At most, if admissible at all, it would only be evidence to support the allegation of knowledge of the defective condition of the machine by the defendant. But I do not think it is admissible, much less proper to be pleaded.

The order will go striking out paragraph 9. Costs to the defendant in any event.

An appeal from the above judgment was argued before MACMAHON, J., who gave judgment on the 7th December, 1903, affirming the order of the Master in Chambers.

G. A. B.

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[IN CHAMBERS.]

## THE NOXON CO. (LIMITED) v. COX.

1903

Nov. 26.

*Venue—Change of—Contract Giving Jurisdiction Where Plaintiffs' Head Office is,*

In an action brought in the county court of the county where the plaintiffs head office was located, on an agreement which contained a provision "that on default in payment suit therefor may be entered, tried and finally disposed of in the Court where the head office of the company is located," a motion to change the venue to another county was refused on the grounds that the word "Court" is to be understood as meaning "the Court having jurisdiction" mentioned in section 1 (a) of 3 Edw. VII. (O.), and should be construed in reference to the contract in which it occurs; and that the parties had agreed that, in case of litigation, the suit should be carried on in the Court, whether high court, county court, or division court having jurisdiction in the locality where the head office was.

THIS was a motion to change the venue and transfer the action from the county court of the county of Oxford to the county court of the county of Huron, the head office of the plaintiffs being situated in the former county.

The motion was argued before Mr. Cartwright, the Master in Chambers, on the 24th November, 1903.

*W. Proudfoot*, K.C., for the motion.

*C. A. Moss*, contra.

The facts appear in the judgment.

November 26. THE MASTER IN CHAMBERS:—The action is on an agreement to pay a note of \$125 and give an old machine as the price of a new one. The defendant signed the usual contract. This states that on default in payment "suit therefor may be *entered, tried and finally* disposed of *in the Court where the head office of the Noxon Co. (Limited) is located.*"

It was argued for the plaintiff that this provision was a bar to the motion.

I am not aware of any reported decision on the meaning of the words italicised. They seem to be in common use by companies such as the plaintiffs. This appears from ch. 13, sec. 1a of 3 Edw. VII. (O.) It was argued that the words now under consideration were only applicable to a division

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court. No doubt they are so applicable. But I do not think that they are to be so restricted. It seems to me more reasonable to hold that the word "Court" is to be understood as meaning "the Court having jurisdiction": see the statute just cited; and to be construed in reference to the contract in which it occurs. Then the whole becomes simple and intelligible. And the parties agree that in case of litigation the same shall be carried on in the Court (whatever it is, whether the High Court of Justice, County Court or Division Court) having jurisdiction over the subject matter of the action in the locality where the head office of the company is located. I therefore refuse the motion on this ground and give no opinion on the merits.

The plaintiffs are willing to let any extra expense of trial at Woodstock be to the defendant in any event. This term will be embodied in the order.

Costs may be in the cause.

It may be well that in county court cases stronger grounds must be shewn than on a motion to change venue in the High Court of Justice, because in the former the whole action has to be removed from the forum selected by the plaintiff as being most convenient to himself.

An appeal from the above judgment was argued on the 30th November, 1903, before BOYD, C., who on the same day affirmed the order of the Master in Chambers.

G. A. B.



[IN CHAMBERS.]

HUNTER V. BOYD.

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Nov. 28.

*Amendment of Pleading After New Trial Ordered—Allegation of Special Damage.*

All necessary amendments may be made at any time, and an action, in which a non-suit has been set aside as against one defendant and a new trial ordered, as to him, by a Divisional Court, is in the same position as if it was at issue and had not been tried; and the plaintiff may be allowed to amend the statement of claim by inserting a paragraph claiming special damages.

*The Duke of Buccleugh*, [1892] P.D. 201 specially referred to.

*Semble*, that while it may be convenient to submit a draft amendment it is not necessary so to do.

THIS was a motion made to amend a statement of claim by inserting a paragraph claiming special damages after trial and an appeal to a Divisional Court, which had set aside a nonsuit as against one defendant (Ewart) and ordered a new trial as to him.

The motion was argued before Mr. Cartwright, Master in Chambers, on the 26th November, 1903.

*W. R. Wadsworth*, for the motion.

*W. R. Riddell*, K.C., contra.

November 28. THE MASTER IN CHAMBERS:—The Divisional Court in this case set aside the nonsuit as against defendant Ewart and ordered a new trial. (See 2 O.W.R. 724.)

A motion has now been made to amend the statement of claim "by inserting a paragraph claiming special damages."

The motion was opposed on the following grounds:—

(1) That no draft amendment was submitted. As to this, it is no doubt convenient to do so, as there might be a discussion which would avoid any motion thereafter against the plea. But I do not think it is necessary to do this.

(2) That the affidavit was not sufficient. This can be remedied if plaintiff desires to do so as a matter of precaution.

(3) But the main ground was that the motion was too late after what took place at the trial. Having regard to the language of Rule 312 as explained in *Williams v. Leonard*

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(1895), 16 P.R. 544 ; *Patterson v. Central Canada Savings and Loan Co.* (1897), 17 P.R. 470 ; and *Chevalier v. Ross* (1902), 3 O.L.R. 219, I have no doubt that the plaintiff must be allowed to make such amendments as he may be advised in order to set up a claim for special damages.

Rule 312 says that all necessary amendments may be made *at any time*.

So far as I am aware these words have never been limited, except in such cases as *Johnston v. Consumers' Gas Company of Toronto* (1896), 17 P.R. 297, and *Sales v. Lake Erie and Detroit River R.W. Co.* (1896), 17 P.R. 224, both cases in the Court of Appeal.

On the other hand it was expressly decided in *The Duke of Buccleugh*, [1892] P.D. 201, that even after a case had been to the House of Lords a new plaintiff might be substituted for one wrongly so made. Their decision was based on this, that the words "at any stage" meant "as long as anything remained to be done." Now in the present case the action is just as if it was at issue and had not yet been tried.

Then if the plaintiff can maintain his action against the present defendant, he is entitled to an opportunity of shewing any special damage he may have suffered and claiming compensation for same. This would be "calculated to secure the giving of judgment according to the very right and justice of the case."

But the defendant must be fully indemnified in respect of such amendment. It may virtually amount to a new action. Further examinations for discovery, and further affidavits on production may be necessary.

The order will therefore provide that plaintiff file and serve such amendments as he may be advised within a week ; that defendant shall have eight days within which to deliver such amended defence as he may be advised ; and that the costs of this motion, with all costs either lost or incurred by reason of this order, shall be to the defendant in any event.

G. A. B.

[IN CHAMBERS.]

CANADIAN GENERAL ELECTRIC CO. (LIMITED)

v.

THE TAGONA WATER AND LIGHT CO.

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Nov. 28.

*Motion for Judgment under Rule 603—Goods Sold and Delivered—Company—Admission of Amount—Excess of Statutory Limit—Directors' Liability—R.S.O. 1897, ch. 199, secs. 11 and 40.*

In an action against a company incorporated under R.S.O. 1897, ch. 199, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limits prescribed by secs. 11 and 40 of that Act, and that the directors were personally liable and not the company, a motion for summary judgment was dismissed.—

*Jacobs v. Booth's Distillery Co.* (1901), 85 L.T.R. 262, followed.

THIS was a motion for judgment, under Con. Rule 603, in an action for goods sold and delivered.

The motion was argued before Mr. Cartwright, Master in Chambers, on the 27th November, 1903.

*E. G. Long*, for the motion.

*J. W. Bain*, contra.

November 28. THE MASTER IN CHAMBERS:—The amount of the claim is admitted.

The motion was resisted on the ground that the affidavit of defendants' general auditor shews that the indebtedness of the defendants largely exceeds the limits prescribed by R.S.O. 1897, ch. 199, and that under secs. 11 and 40 the directors are personally liable but not the company.\*

Whether this contention is right, and whether sec. 11 gives an exclusive and not an alternative remedy seems a question fairly arguable within the rule laid down in *Jacobs v. Booth Distillery Co.* (1901), 85 L.T.R. 262, "is there a triable issue to go before a Court or jury?"

I therefore think the motion must be dismissed with costs in the cause.

\*11. If the indebtedness of the company at any time exceeds the amount of its capital stock, the directors assenting thereto shall be personally and individually liable to the creditors of the company for such excess.

40. All such bonds, contracts, mortgages and instruments so signed and sealed by the person authorized as aforesaid, and also such notes and bills so signed, drawn or accepted by the person authorized as aforesaid, shall be valid and binding on the company, and be held to be the act and deed of the company; but such bonds, bills or debentures and securities as aforesaid shall not exceed the amount which the company is by this Act empowered to borrow.

G. A. B.

[IN CHAMBERS.]

1903

PHERRILL V. PHERRILL.

Dec. 10.

*Alimony—Interim—Inability of Defendant to pay.*

An order for interim alimony will not be made against a defendant where it is not shewn that he has the means to comply with such an order if made.

THIS was a motion for interim alimony.

The motion was argued before MR. Cartwright, the Master in Chambers, on the 7th of December, 1903.

*J. M. Godfrey*, for the plaintiff.

*Allan McNabb*, for the defendant.

The facts appear in the judgment.

December 10. THE MASTER IN CHAMBERS:—Assuming that the plaintiff is *prima facie* entitled to the usual order, I do not see how it can be granted in the present case.

The only material before me in support of the motion is the plaintiff's affidavit. This states that the allegations in the statement of claim are true, and denies the allegations in the statement of defence. There is no evidence of any kind as to the ability of the defendant to pay, if an order is made.

On the other hand, the affidavit of defendant states positively that he "is unable to pay any sum to the plaintiff for alimony, should the Court direct any." He states that the land he works, as a market gardener, belongs to his mother: that owing to the plaintiff's desertion he is in arrear as to his rent; and that his mother has a chattel mortgage on his chattels, as security for such arrears. This affidavit is not impeached, either by cross-examination or affidavits in reply. It must, therefore, be assumed to be true.

It would be useless to make an order against a man who has no property on which it could operate, and when there is no evidence as to his earning power.

The motion is therefore dismissed.



## [DIVISIONAL COURT.]

LINTNER V. LINTNER.

D. C.

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Dec. 17.

*Detinue—Demand and Refusal after Action—Inference of Conversion before Action—Husband and Wife.*

The plaintiff left her husband, the defendant, on the 21st October, 1902, and brought this action for certain chattels of hers which remained upon his land, and for pecuniary damages for the detention thereof. On the 27th November, 1902, after the action had been begun, she went to his house and demanded her property. He said, in effect, that he did not wish her to take her things away, because he was anxious that she should go back to live with him, and did not consent to her removing the articles, but that she might remove or leave them as she saw fit :—

*Held*, that this did not shew such a refusal of her demand as would enable her to sustain the action, if a demand and refusal after action were sufficient in detinue, as to which *quære*.

*Semble*, that, if the action had been for the conversion of the plaintiff's property, nothing was shewn from which the inference that there had been a conversion before action could properly be drawn.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

AN appeal by the defendant from the judgment of Falconbridge, C.J.K.B., in favour of the plaintiff in an action of detinue tried before him without a jury at Stratford on the 19th June, 1903. The facts and arguments are stated in the judgment.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 10th November, 1903.

*R. S. Robertson*, for the appellant.

*J. P. Mabee*, K.C., for the plaintiff, respondent.

December 17. The judgment of the Court was delivered by MEREDITH, C.J.:—The appellant and the respondent are husband and wife; the wife had on the 21st October, 1902, left her husband, with whom she had been living, under circumstances which, according to her contention, entitled her to alimony. When she left, there remained in the dwelling house in which they had lived and in which the husband continued to reside, and on the farm on which the dwelling house was situate, personal property belonging to the wife, consisting of household furniture and other goods and chattels and a number

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of cows and sheep, and the claim of the wife in this action is for the detention of this property, *i.e.*, substantially the old action of detinue, and for pecuniary damages for the detention.

At the trial, no evidence was given either of a refusal by the appellant to deliver the property to the respondent or of any demand of it by her before action, but the respondent endeavoured to shew that on the 27th November, 1902, after the commencement of the action, which was begun on the 21st of the previous month, there had been a demand and refusal, which her counsel argued, on the authority of *Blackley v. Dooley* (1889), 18 O.R. 381, *Morris v. Pugh* (1761), 3 Burr. 1242, *Wilton v. Girdlestone* (1822), 5 B. & Ald. 847, and *Thorogood v. Robinson* (1845), 6 Q.B. 769, was sufficient to entitle her to recover.

The learned Chief Justice gave no reasons for his judgment, and made no express findings of fact. He, however, gave judgment for the respondent for "the possession" of part of the property claimed by her, with \$1 damages and costs, which he fixed at \$40, and must, therefore, have come to the conclusion that there had been a demand and refusal on the 27th November, 1902, and that that was sufficient to entitle the respondent to maintain her action.

I am, with respect, of opinion that a demand and refusal on the 27th November, 1902, was not proved.

It appeared in evidence that the appellant was most anxious that his wife should return to live with him, and that he made frequent efforts to induce her to do so; that after these efforts had failed the respondent, on the 27th November, 1902, went with several men and teams to the appellant's residence for the purpose of taking away her property; that at this time she had brought or had threatened to bring an action for alimony against the appellant; and that it is probable that he, as his counsel urged, feared that if he consented to the respondent taking away her property he might thereby prejudice his defence to the action for alimony, and it appears to me that, looking at the matter in the light of these circumstances, the fair result of the testimony given at the trial as to what occurred on the 27th November, 1902, is that the appellant's answer to the respondent's demand for her property was in

substance this: "I do not want you to take your things away. I am anxious that you shall come back to live with me, and I am ready to receive you again, but if you insist on taking away your property I will not interfere with your doing so. I do not consent to your taking it away, because if I do so I may prejudice my defence to the alimony suit you have brought or threatened to bring against me, but having heard what I have to say you may act according to your own pleasure and remove or leave your property, as you see fit." And it is not, I think, open to question that if the respondent had then and there chosen to take away her property, she would not have been interfered with by the appellant or prevented from doing so.

If this is the correct view of the effect of the testimony, it follows that the respondent's case failed, for, in that view, there was no refusal by the appellant at any time to give up to the respondent her property.

But, if what I have assumed to be in this respect the finding of fact of the learned Chief Justice was justified by the evidence, I am of opinion that it does not help the respondent, at all events to the extent of entitling her to succeed in her action.

The cases to which reference has been made no doubt established that a demand and refusal *in an action for the conversion of goods* being only evidence of a conversion, a demand and refusal though after action may afford evidence of a conversion before action, and that, even where there has been no demand before bringing the action, the conduct of the defendant may afford such evidence.

While such an inference may, it does not of course follow that it must, be drawn, and whether it ought or ought not to be drawn in a particular case must depend upon the facts of that case.

If this were an action for the conversion of the respondent's property, the inference that there was a conversion before action, in my opinion, upon the facts and circumstances appearing in evidence, ought not to be drawn.

The respondent left the appellant on the very day on which her action was begun, and there is no pretence for saying that

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on that day any demand was made by her for her property or any refusal by the appellant to let her take it with her, if she had been minded to do so.

The writ was not served until the 6th May following, and on the 13th of the same month a written notice was given by the appellant's solicitor to the respondent's solicitors, informing them that the appellant made no claim to the property of the respondent for the possession of which she has obtained judgment; that it was on the appellant's premises, where it had been left by the respondent, and that she might take all of it at any time; and, though there is in the statement of defence a general denial of the allegations of the statement of claim, in the 6th paragraph the giving of the notice of the 13th May is set out, followed by the statement that the respondent had not removed or taken possession of the property pursuant to the notice, and that the appellant was still willing that she should have it, as stated in the notice, and that he "makes no claim" to it.

It is further to be observed that in the particulars which were delivered by the respondent, the only occasions on which it is alleged that a demand of the return of the property was made are on the 22nd October, 1902 (of which there is no evidence), and on the 27th November, 1902.

In view of these facts and circumstances, it appears to me that had the action been for the conversion of the respondent's property there was nothing shewn from which the inference that there had been a conversion before action could properly be drawn, but that the proper inference from these facts and circumstances would be that there had not been any conversion before action.

The respondent's action is not, however, for the conversion but for the detention of her property, and it is at least open to question whether the rule of evidence to which I have referred is applicable to an action "for the delivery of goods" as it is described in the Consolidated Rules, if indeed it is not clear that it is not applicable to such an action.

It was said by Haughton J., in *Isaack v. Clark* (1614), 2 Bulstrode 306, 308, that request and refusal, *contradixit et adhuc contradicit*, is the point in an action of detinue, but not



in trover, in which conversion is the point, and request and refusal evidence only, and this statement of the distinction between the purpose and effect of a demand and refusal is quoted by Chief Baron Pollock in *Clements v. Flight* (1846), 16 M. & W. 42, at p. 50.

See also *Jones v. Dowle* (1841), 9 M. & W. 19, *per* Parke, B., the remarks of Parke, B., and Alderson, B., in *Clements v. Flight*, at pp. 46 and 47; *Needham v. Rawbone* (1844), cited in the note to *Thorogood v. Robinson*, 6 Q.B. at p. 771; *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206.

For these reasons, I am of opinion that the appeal should be allowed and the judgment appealed from be reversed, and that in lieu of it judgment should be entered dismissing the action.

Under all the circumstances, there should be no costs to either party of the appeal or of the action, and in entering the judgment the issue as to the ownership of the property the possession of which she was by the judgment appealed from declared to be entitled to, should be found in favour of the respondent.

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## CONFEDERATION LIFE ASSOCIATION V. MOORE.

Dec. 9.  
Dec. 18.*Pleading—Statement of Claim—Delivery after Defence—Irregularity.*

The defendant entered an appearance and at the same time filed a statement of defence and counterclaim, which he then served, and gave notice to the plaintiffs that he did not require the delivery of a statement of claim :—

*Held*, that a statement of claim subsequently delivered by the plaintiffs was irregular. The indorsement on the writ of summons had become the statement of claim, and if not sufficient could be amended without leave.

Rules 171, 243, 247, 256, 300, considered.

MOTION by the defendant to set aside a statement of claim for irregularity. The facts are stated in the judgments.

The motion was heard by Mr. Cartwright, the Master in Chambers, on the 5th December, 1903.

*A. J. Russell Snow*, for the defendant.

*C. P. Smith*, for the plaintiffs.

December 9. THE MASTER IN CHAMBERS:—After the default judgment in this case had been set aside (see *ante* 603), the defendant, on the last day for entering an appearance, namely, the 23rd November ultimo, not only appeared but at the same time filed a statement of defence and counterclaim; gave notice to the plaintiffs that he did not require a statement of claim; and took out an order to produce. This apparently the plaintiffs obeyed, and at the same time, *i.e.*, on the 3rd December instant, they filed a statement of claim, which the defendant now moves to set aside on the ground of irregularity.

The motion was supported by reference to Rule 171, which says: "If a defendant does not require the plaintiff to deliver a statement of claim he shall so state in his memorandum of appearance, and in that case shall serve a copy thereof on the plaintiff."

The defendant also relied on Rule 247 as authorizing him to deliver the defence or counterclaim within any time within 8 days after appearance.

He further contended that the filing of the affidavit on production by the plaintiffs was an admission of the regularity of

the defendant's practice, and that it is contrary to the Rules of Court to permit the filing of a statement of claim after delivery of the statement of defence.

He also moved for an order striking out the statement of claim on the ground that it set up a different cause of action from that in the indorsement on the writ of summons.

The plaintiffs answered these contentions by relying on the express provisions of Rule 243 (b), which says: "The plaintiff may, if he thinks fit, deliver a statement of claim, with the writ, or notice in lieu of writ, or at any time afterwards, either before or after appearance, and although the defendant may have appeared" (as in this case) "and stated that he does not require the delivery of a statement of claim."

I think the contentions of the plaintiffs must prevail.

For the success of the defendant's argument it would be necessary either that Rule 171 should have said that no statement of claim could be served after appearance without leave of the Court or that a similar addition should have been made to Rule 247. To hold otherwise would enable the defendant to become practically *dominus litis*, and prevent the plaintiff from availing himself of the beneficial provisions of Rule 244.

As to the argument that the plaintiffs are estopped by filing their affidavit on production, I do not think this is entitled to any weight. In this case all the facts and documents are well known to both parties, who are thoroughly conversant with the dealings as to the blanket mortgage and the Ivey and Blackley mortgages which form the real ground of dispute in the present action. Nothing, therefore, would have been gained by delaying production, even in case the order was issued prematurely, which, in my opinion, it was not. Therefore all grounds of irregularity fail, and in my opinion, so far as they are concerned, the motion must be dismissed with costs to the plaintiffs in any event.

There remains for consideration the other ground that the statement of claim, even if properly filed, exceeds the provisions of Rule 244. Upon examining the indorsement on the writ of summons and the statement of claim, I think the objection fails. The only difference is that in the writ credit is given for the Ivey and Blackley mortgages so as to reduce the

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principal on the original mortgage. The account is then taken for the balance of that mortgage, and afterwards the accounts of the Ivey and Blackley mortgages separately, the claim being for these three several amounts. In the statement of claim it is alleged that the Ivey and Blackley mortgages were collateral, the defendant joining in them as a guarantor. The claim is then made as on the original mortgage, credit being given for all payments received on account of Ivey and Blackley mortgages, the result in both cases being substantially the same. This, in my view, does not exceed the liberty given to a plaintiff by Rule 244. The motion fails on all grounds and must be dismissed with costs to the plaintiffs in any event.

It is further to be observed that Rule 539 requires a certified copy of the pleadings to be delivered before trial.

The definition of pleading in sec. 2 (sub-sec. 9) of the Judicature Act does not apparently include the writ of summons. Unless therefore under Rule 245 the plaintiff has made the special indorsement his statement of claim in the action, it would seem there would be no pleading on the part of the plaintiff (if the defendant's contention in the present case is correct), as there is no power given to the defendant to give such an effect to the special indorsement without the acquiescence of the plaintiff under Rule 245. Even in cases under that Rule power is given to the Court to direct a further statement of claim to be delivered in a proper case.

The defendant appealed, and his appeal was heard by MEREDITH, J., in Chambers, on the 14th December, 1903.

*W. E. Middleton*, for the defendant.

*C. P. Smith*, for the plaintiffs.

December 18. MEREDITH, J.:—The Rules are to be so construed as to give effect, if possible, to all of them, and to bring all of their provisions into harmony.

That can, substantially, be done in this case, though there may be an apparent conflict between the provision giving a defendant power to treat the indorsement upon the writ as a statement of claim and to deliver a statement of defence, and the provision allowing a plaintiff three months after appearance



to deliver a statement of claim. The harmony is made if the indorsement upon the writ becomes and is the plaintiff's statement of claim. The rule allowing the three months cannot give a right to deliver a second statement of claim.

That seems to me a fairly satisfactory solution of the main question involved in this motion, and to work out a convenient and satisfactory practice. The plaintiff cannot complain, for, when making his indorsement, he does it with a knowledge that the defendant may treat it as the statement of claim, and it can be framed accordingly, and, after the delivery of the statement of defence, a plaintiff has such wide power of amendment that he can then frame his statement of claim, without any order or leave, in the form it would have taken if the defendant had not elected to treat the indorsement upon the writ as a statement of claim.

That the defendant may thus reduce the usual time allowed to a plaintiff to deliver his statement of claim is not an evil—anything that fairly brings the parties the quicker to trial and out of litigation, ought to be deemed rather the opposite of an evil. And why should a party have three months or three days or three minutes to do that which he is altogether relieved from doing—in this case to deliver a pleading which he is not required, and there is no need, to deliver? There is no injustice or inconvenience in this solution of the difficulty. On the other hand, if the learned Master were right, the plaintiff could at his option render entirely futile the provisions of the Rule under which the defence was delivered, and bring about the anomaly, and wasted cost, of a defence duly delivered being rendered wholly ineffectual by the plaintiff choosing needlessly to deliver a statement of claim, instead of doing that which would be just as effectual and would harmonise everything—amend.

Whichever view of the question is taken, some difficulty is met. In this view of it, the plaintiff does not get three months' time to bring forth an unnecessary (having regard to the power to amend) pleading. The words of paragraph (b) of Rule 243 give that right, *although the defendant may have appeared and stated that he does not require the delivery of a statement of claim*, but not *although he may*, as the Rules permit and require—see Rule 586—*have delivered a statement of defence*. On

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the other hand, if the statement of claim may be delivered notwithstanding the delivery of the statement of defence, a plaintiff can, at his will, deprive a defendant of the right conferred by Rule 247, in fact turn it into a dead letter, and all done under it into wasted energy and expense, without any substantial reason for the waste. And also some violence is done to Rule 256, which requires a plaintiff to reply, if he desires to reply, within three weeks after *the defence* has been delivered; and again to Rule 300 as to amending. The provisions of the Rules in the plaintiff's favour are not rendered wholly ineffectual: he may deliver a statement of claim within the three months if no statement of defence is delivered within the 8 days, notwithstanding that the appearance may have stated that a statement of claim was not required.

For some purposes the indorsement upon the writ must be considered a pleading: that is made plain by the recent amendment of Rule 300.\* I would have thought it must always have been so where no other statement of claim was delivered and the defendant had pleaded to it as the plaintiff's statement of claim.

But in truth no very alarming wrong is done whether the one or the other mode of practice is adopted. It is more important to have it settled one way or other. The more convenient and more correct way to settle it is as I have indicated; and, therefore, the appeal will be allowed and the statement of claim set aside; but all costs of the motion and appeal will be costs in the action, and, if required, the plaintiffs' time for replying or amending will be enlarged for three weeks from to-day.

\* Rule 300 as amended on the 20th June, 1903:

A plaintiff may, without leave, amend his statement of claim, whether indorsed on the writ or not, once, either before the statement of defence has been delivered, or after it has been delivered and before the expiration of time limited for reply, and before replying.

E. B. B.

## [DIVISIONAL COURT.]

## STANDARD LIFE ASSURANCE COMPANY V. TWEED.

D. C.

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Oct. 31.

*Municipal Corporations—Debentures—Defective By-law—Remedial Enactment—*  
3 Edw. 7, C. 18, S. 93.

A municipal by-law made in 1892, on which debentures were issued, provided for payment of the interest, but failed to provide for payment of the principal. All interest on the debentures was duly paid, but not the principal, though that too had fallen due. 3 Edw. 7, ch. 18, sec. 93 (O.), enacts that "where in the case of any by-law heretofore or hereafter passed, the interest for one year or more on the debentures issued under such by-law and the principal for the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding:"—

*Held*, that the effect of this is to make one payment of interest validate the debenture in respect of which it is paid, and one payment of principal validate the series in respect to which it is paid, and that accordingly the debentures in question were validated.

THIS matter came up upon a stated case setting out the following facts, agreed upon between counsel, for the purpose of appeal from the judgment of Ferguson, J., dated September 15th, 1903, reported 2 O.W.R. 747, wherein he held the by-law in question, the provisions of which are sufficiently stated below, and the debentures sued on, to be valid and binding upon the defendants, and that 3 Edw. VII. ch. 19, sec. 432 directly applied.

In April, 1892, by-law No. 15, being the by-law in question, was passed by the council of the village of Tweed for the purpose of issuing debentures to raise the sum of \$5,000.

The debentures issued under this by-law were purchased by the plaintiffs in January, 1893.

All interest was paid on the said debentures as it fell due.

The debentures were presented for payment on March 25th, 1902, but payment was refused.

This action was commenced on July 20th, 1903.

The only question raised now was whether the debentures so issued were valid and binding on the corporation.

The other facts of the case appear in the judgment.

The matter was argued on October 9th, 1903, before BOYD, C., and MACMAHON, and TEETZEL, JJ.

C. W. Craig, and J. A. Mills, for the defendants, referred to R.S.O. 1887, ch. 184, sec. 340, as the statute in force at the time

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the by-law was passed, and contended that the by-law had not provided a fund for payment of principal, though it had for payment of interest, and had so disregarded the imperative provisions of the statute; that no fund being provided by the by-law to pay the debt, and no other method being provided, when the principal fell due in March, 1902, the municipality had no legal way of paying it; that the amendment contained in the Act of 1903, 3 Edw. VII., ch. 19, sec. 432, could not validate debentures which matured a year and a half before it was passed, for it should not be construed retroactively; that there had been no payment of the principal here such as is spoken of in the said sec. 432; that that enactment means that if what has accrued due up to the time the Act came into force has been paid, then the balance must be paid: *Hardcastle on Statute Law*, 3rd ed., p. 353 *et seq.*

*A. Bruce*, K.C., and *D.L. McCarthy*, for the plaintiffs, referred to the previous legislation in *eodem materiâ* with sec. 432, namely, 44 Vict. ch. 24, sec. 27 (O.), 46 Vict. ch. 18, sec. 409 (O.), R.S.O. 1887, ch. 184, sec. 340, and contended that it shewed the intention to be to deal with two classes of debentures, namely, those where interest only is maturing, and those where principal also is maturing during the term of the debentures, and that it was absurd to say that sec. 432 only applies to debentures of which all principal has accrued due and been paid; that it was retroactive on its face: *Maxwell on Statutes*, 3rd ed., pp. 84, 240, 256; *Hardcastle on Statute Law*, 3rd ed., pp. 108, 109.

October 31. The judgment of the Court was delivered by *BOYD, C.*:—The village of Tweed raised \$5,000 to assist a local enterprise and secured it by five debentures for \$1,000 each, issued on August 9th, 1892, and payable at the end of ten years with interest meanwhile half-yearly. All the interest has been punctually paid and the time has elapsed for the payment of the principal which fell due on March 25th, 1902. The by-law makes no provision for the payment of the principal of these debentures, and unless the transaction has been validated by the Legislature, there exists no legal right to sue for the principal money on these debentures which have no higher binding force than the imperfect by-law.



The statute, 44 Vict. ch. 24, sec. 27 (O.), which was carried into the Consolidated Municipal Act of 1883, 46 Vict. ch. 18 (O.) as sec. 409, provides for validating any debentures theretofore issued under any by-law where the interest on such debentures and the principal of such thereof, "if any," as shall heretofore have fallen due, has been heretofore paid for the period of two years and more.

In the revision of 1887 this provision was (apparently improvidently) limited to debentures issued prior to February, 1883 (R.S.O. 1887, ch. 184, sec. 408), and the like limitation was carried forward into the next decennial revision, R.S.O. 1897, ch. 223, sec. 432.

On June 27th, 1903, this section was repealed and a new provision substituted in these words: "Where in the case of any by-law heretofore or hereafter passed by a municipal council, the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures, "if any," has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding . . . : 3 Edw. VII., ch. 18, sec. 93 (O.), (and *ib.* ch. 19, sec. 432). It is to be borne in mind that municipal debentures are broadly of two classes (1) in which the principal money is to be paid at the end of the fixed period with interest payable in the interval, and (2) in which the principal is payable by annual instalments with proportionate interest: Municipal Act, 1897, R.S.O. ch. 223, secs. 384, 386.

The principle enunciated in the curative enactment appears to be that one payment of interest will validate the debenture in respect of which it is paid, and one payment of principal will validate the series in respect of which it is paid. It cannot be said that the original section of 1881 is happily or even lucidly expressed, and it has not been made plainer in the course of subsequent legislation. Yet I think the present section yields the net result I have endeavoured to indicate, and with such sufficient clearness as may justify the Court in so expounding it.

These debentures, therefore, come within the scope of this remedial enactment, and the order directing judgment for the amount should be affirmed with costs.

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## [IN THE COURT OF APPEAL.]

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Nov. 15.

## HINDS V. THE CORPORATION OF THE TOWN OF BARRIE.

*Practice—Joinder of Defendants—Rules 186, 187—Separate Causes of Action.*

Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate.

In this case the plaintiff sued for the obstruction of a water course which passed through her property, causing it to be overflowed, and charged that the natural effect of the concurrent acts of the defendants, separate property owners, was to cause the water to become obstructed and to overflow the plaintiff's land, but without alleging that these acts were done in concert, or that the defendants were jointly concerned in their commission :—

*Held*, that the plaintiff must elect against which of the two defendants she would continue the action.

THE motion out of which this appeal arose was for an order requiring the plaintiff to elect against which of the two defendants to this action she would proceed and against which she would abandon her claim, on the ground that the plaintiff's statement of claim, the contents of which are sufficiently stated in the judgment of this Court, disclosed that the defendants were being sued in the same action as alleged separate tort-feasors in respect of alleged separate and distinct torts, and the joinder of of the said two claims was improper and would prejudice and embarrass the said defendants in making their defence, and that pending such election proceedings should be stayed. It came originally before His Honour Judge Ardagh, local Judge of the High Court at Barrie, and was referred by him to a Judge of the High Court under Consolidated Rule 45 (2). It then came before Meredith, C.J.C.P., on October 17, 1902, who dismissed the application. An appeal was taken from this order to the Divisional Court and was argued on November 3rd, 1902, before Falconbridge, C.J.K.B., and Street, J., who at close of the argument gave oral judgment dismissing the appeal with costs.

The present appeal to this Court was then taken, and was argued on September 16th and 17th, 1903, before Moss, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

*W. M. Douglas*, K.C., for the defendants appellant, contended that the flooding did not connect the acts of the parties; that

well settled practice under Con. Rules 185 and 187\* required separate actions to be brought, and that though there might be two injurious acts with only one resultant damnum, this did not authorise suing the doers of them together: *Sadler v. Great Western R.W. Co.*, [1895] 2 Q.B. 688, 693, [1896] A.C. 450; *Smurthwaite v. Hannay*, [1894] A. C. 494; *Thorpe v. Brumfit* (1873), L. R. 8 Ch. 650; *Lambton v. Mellish*, [1894] 3 Ch. 163; that *Ratté v. Booth* (1885) 10 P.R. 649, is distinguishable, as the act was there looked at as the joint act of the defendants, or if not distinguishable, was inconsistent with the English cases, and prior to the *Smurthwaite case*; that there can be no severance of damages. He also cited *Thompson v. London County Council*, [1899] 1 Q.B. 840; *Quigley v. Waterloo Manufacturing Co.* (1901), 1 O.L.R. 606; *Evans v. Jaffray* (1901), 1 O.L.R. 614; and asked to have the same practice upheld as had been laid down in England.

*A. E. K. Creswicke*, for the plaintiff respondent, contended that as the plaintiff's claim was that the two defendants together pressed the water back, and she claimed one set of damages from the two, she was entitled to sue them together; that it was not necessary to have concurrence in the minds of the two defendants, if they in fact concurred in causing the damage; that if the act of one of two defendants does no harm, but the act of both does, they can be sued together in one joint action: *Mitchell v. Darley Main Colliery Co.* (1884), 14 Q.B.D. 125, 11 App. Cas. 127, at p. 145; *Crane v. Hunt & Wayper* (1895), 26 O.R. 641; *Slater v. Mersereau* (1876), 64 N.Y. 492; *Colegrove v. New York and New Haven Railway Co.* (1859), 20 N.Y. 492; *Head v. Bowman* (1881), 9 P.R. 12; *Clayton v. Patterson* (1900), 32 O.R. 435; *Allison v. Breen* (1900), 19 P.R. 143; *Cowan v. Duke of Buccleugh* (1876), 2 App. Cas. 344; that

\* 186. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and, without any amendment, judgment may be given against one or more of the defendants according to their respective liabilities

187. It shall not be necessary that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest.

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*Ratté v. Booth* is exactly parallel to this case; that in *Sadler v. Great Western R.W. Co.* it is not alleged that the defendants acted jointly. He also cited *Walters v. Green*, [1899] 2 Ch. 696, especially at p. 701; *Bennett & Co. v. McIlwraith & Co.*, [1896] 2 Q.B. 464; *Massey v. Heynes* (1888), 21 Q.B.D. 330; *Indigo Company v. Ogilvy*, [1891], 2 Ch. 31, 40; *Lambton v. Cox*, [1894], 3 Ch. 163; *Holms. & Langton, Judicature Act*, p. 410; and asked to have, if necessary, leave to amend by alleging a joint cause of action.

*Douglas*, in reply, contended that the *Thompson v. London County Council*, [1899], 1 Q.B. 840, and *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q.B. 504, are decisive against allowing an amendment; that if what each did was lawful, there is no cause of action, which takes the case out of *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; that in many of the cases cited for the respondent the point raised here was never taken; and that clearly there could be no joint action against the defendants here, if there was no joint cause of action.

November 15. The judgment of the Court was delivered by OSLER, J.A.:—The question is whether under Consolidated Rules 186, 187, the plaintiff is entitled to retain both the defendants in the action, or whether she must not elect against which of the two she will continue it.

The plaintiff sues for the obstruction of a watercourse which passes through her property, thereby causing it to be overflowed and damaged.

The statement of claim alleges in paragraph 4 that the plaintiff's premises and those of the defendant Webb are nearly opposite each other, separated only by a street or highway of the corporation defendants.

5. That a natural watercourse has long existed which runs easterly and then northerly through the town, passing through the plaintiff's premises, and then, after crossing the street aforesaid, through the defendant Webb's premises, and thence to Kempenfeldt Bay.

6. That the defendants the town constructed a culvert over the watercourse crossing the street.



7. That before the grievances complained of, the town diverted into the said watercourse large quantities of water which would not but for such act have passed into it and through the plaintiff's premises.

7. That the culvert so constructed by the town was not large enough to permit the waters running down the watercourse to be carried down the same to the bay.

8. The defendant Webb contracted the watercourse where the same ran through his premises, by boxing it in with timber and covering it with earth.

9. The defendants the town likewise diminished and further contracted the said watercourse through the culvert constructed by them, by putting sewer, water, and other pipes across the culvert, thereby diminishing the capacity for the flow of water through the same.

10. The natural and consequent effect of putting in the said sewer, water, and other pipes across the culvert, in addition to diminishing the capacity as aforesaid, was to obstruct and collect driftwood, etc., and other floating material as it passed down the watercourse, and to cause it to become lodged against the pipes and thus obstruct the flow of water through them; and the said watercourse did thereby become obstructed at and for a long time before the time hereafter referred to.

11. The natural and consequent effect of the combined acts of the defendants was, during freshets, to cause the waters flowing down in the said watercourse to be and become obstructed in their flow to the bay, and to thereby be dammed back upon and to overflow the lands of the plaintiff.

12. The defendants the town having constructed the culvert and diverted waters to the watercourse which would not otherwise have come there, and having allowed it to become blocked with driftwood, rubbish, etc., and the watercourse having been further contracted where it crossed the lands of the defendant Webb, it became choked and stopped up, by reason whereof the waters and drainage received into it on the 4th and 5th July, 1902, overflowed therefrom upon the plaintiff's lands, and there did the damage complained of.

The plaintiff claims \$1,000 for damage, and such further and other relief as she may be entitled to.

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The defendants the corporation contend that no cause or causes of action is or are disclosed in the statement of claim, which entitles the plaintiff to join them and the defendant Webb as defendants in the action under the provisions of Rules 186 and 187.

The leading case upon the construction and application of the corresponding English rules is *Sadler v. Great Western R. W. Co.*, [1895] 2 Q.B. 688, [1896] A.C. 450.

In dealing with our rules, we ought to follow and apply that decision.

It was there held that claims for damages against two or more defendants in respect of their several liability for several torts cannot be combined in one action.

In *Smurthwaite v. Hannay*, [1894] A.C. 494, a decision upon the former English rule which corresponded with our former Rule 185, it was held that several plaintiffs having several and distinct causes of action could not be joined in one action.

These rules were, in short, expounded as rules dealing merely with parties to an action, and as having no reference to the joinder of several causes of action; a subject which is dealt with, or partially dealt with, by another group of rules, Con. Rules 232 *et seq.*

Our Rule 185, as to the joinder of plaintiffs, has been amended substantially in accordance with the amended English rule, but the rule as to joinder of defendants has not been touched. The reasoning in *Smurthwaite v. Hannay*, and the decision in *Sadler v. Great Western R. W. Co.*, [1895] 2 Q.B. 688, must therefore still be regarded here as in England, when dealing with the latter rule. Different defendants cannot be brought before the Court for the same action where the real causes of action that exist against them are separate.

The enquiry, therefore, must be whether in the statement of claim the plaintiff has alleged a joint cause of action against the defendants. I have scanned the pleading with the desire to find that by any reasonable construction she can be taken to have done so, as the case seems to be one in which her rights against both defendants might be conveniently tried in one action without injury to either. I am obliged, however, to say that no joint cause of action is disclosed. An unlawful act is

alleged against each defendant. It is not charged that these acts were done in concert, or that the defendants were jointly concerned in their commission. The town is charged with having increased the volume of water flowing into the watercourse, at the same time obstructing the latter and diminishing its capacity for carrying it away. Webb is also charged with having contracted the watercourse where it passes through his land, and it is charged that the natural effect of the *combined* acts of the defendants is to cause the water flowing through the watercourse to become obstructed and to be dammed back upon, and to overflow, the plaintiff's land. "Combined," in this connection, the wrongful acts being independent of each other, means no more than "concurrent": *Sadler v. Great Western R.W. Co.*, [1895] 2 Q.B. 688, at p. 694; and does not charge a joint cause of action: S.C. p. 693. Each of these acts being wrongful, gives rise to a separate cause of action against each defendant, though their injurious result may be increased, or even sensibly caused, by the concurrence of both. I refer to *Lambton v. Mellish*, [1894] 3 Ch. 163-166; *Blair v. Deakin* (1887), 57 L.T.N.S. 522-526; *Nixon v. Tynemouth Union Rural Sanitary Authority* (1888), 52 J.P. 504.

As to the acts complained of, and the circumstances under which they may give rise to a joint or a several cause of action, I refer to *Wallace v. Drew* (1871), 59 Barb. 413; *Ames v. Dorset Marble Co.* (1891), 64 Verm. 10; *Bryant v. Bigelow Carpet Co.* (1881), 131 Mass. 491; *Wheeler v. City of Worcester* (1865), 10 Allen 591, 600, 601.

I decide nothing more than seems to be required upon the construction of the pleading before us. I think the language of the rules is embarrassing, if it be not presumptuous to say so, and calculated to mislead a litigant, and promote delay and expense, as may be seen by the numerous explained and distinguished cases found in the books. The principal and agent cases stand upon a footing of their own, which is explained in *Thompson v. London County Council*, [1899] 1 Q.B. 840. So, also, the company and director cases founded on an improperly issued prospectus. Probably the phrase "cause of action" is not to be strictly read in its former technical sense, so that where persons who have been parties to a common act which

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has caused damage to the plaintiff, they may be joined in the same action though the nature and extent of the relief to which he may be entitled against them is different.

I refer also to *Gower v. Couldridge*, [1898] 1 Q.B. 348; *Frankenberg v. Great Horseless Carriage Co.*, [1900] 1 Q.B. 504, 512; *Kent Coal Exploration Co. v. Martin* (1900), 16 Times L.R. 486. Of the cases in our own Courts it is sufficient to note *Quigley v. Waterloo Manufacturing Co.* 1 O.L.R. 606; and *Evans v. Jaffray*, *ib.* 614. I have not overlooked *Booth v. Ratté* (1892), 21 S.C.R. 637. The dictum relied upon, though entitled to all respect, is obiter, and at this stage of the case before us, and the present state of the authorities, I do not see that we can apply it.

The appeal must, therefore, be allowed, and the plaintiff must elect against which of the two defendants she will continue the action; but she is at liberty to amend by setting up, if she can, a joint cause of action.

The costs throughout may be costs in the cause between the plaintiff and the defendants the town.

A. H. F. L.

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[IN THE COURT OF APPEAL.]

REX V. BULLOCK AND STEVENS.

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Oct. 26.

*Criminal Procedure—Several Charges—Hearing Evidence on Second Charge Before Deciding First—Conviction.*

Prisoners were charged before a County Judge on two separate charges of receiving, on two separate days, stolen goods knowing them to be stolen, and of house-breaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge, on Dec. 23rd, the Judge found a *prima facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On Dec. 30th he tried them on the third charge, and acquitted them on it. On December 31st he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the evidence on the second, and was not conscious of having been biased on the second, by the evidence given on the first and third; also that no objection was taken by counsel:—

*Held*, that inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the person charged, and in respect to the principal witness, and in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges, the convictions should be upheld.

THIS was a case stated by His Honour Judge Chisholm, Judge of the county court of the county of Waterloo, particulars of which are set out in the judgment of MACLENNAN, J.A.

The case was argued on September 14th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

*G. F. Kelleher*, for the prisoners, referred to *Hamilton v. Walker*, [1892] 2 Q.B. 25, 67 L.T. 200; *Reg. v. Fry* (1898), 19 Cox 135; *Queen v. Lamoureux* (1900), 4 Can. Cr. Cas. 101; *Queen v. Winslow* (1899), 3 Can. Cr. Cas. 215.

*J. R. Cartwright*, K.C., for the Crown.

October 26. MACLENNAN, J.A.:—This is a case stated by His Honour Judge Chisholm for the opinion of this Court.

The prisoners were convicted before him on two separate charges of receiving stolen goods knowing them to have been stolen, and were acquitted on a third charge of house-breaking and stealing.

The first charge was of having on November 9th, 1902, received tobacco stolen from one James Johns. The second

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charge was of having on October 23rd, 1902, received three razors stolen from one Leonard A. Macdonald, and the third charge was of having on October 23rd broken and entered the shop of Thomas Hamilton and stolen a quantity of ginger ale and lemon sour soda.

The trial took place on the 27th of December. The accusations or indictments on which the prisoners were brought before the Judge were of breaking and entering the shops of the respective parties mentioned with intent to steal, but with consent of the Judge the further charge of receiving was added in the first two cases.

After stating the evidence in the first case—that is the tobacco case—the learned Judge makes the following statement:—

“I find in my note-book that at the close of the case for the Crown it is noted that I dismissed the charge of shop-breaking as charged in the first count, and found a *prima facie* case for receiving stolen tobacco, as charged in the second count, made out. The case was then adjourned to December 30th at 10 a.m., to let in evidence for the defence. This evidence consisted chiefly of evidence of relations and friends of accused as to their character and habits, and shewed that they used tobacco. Evidence for defence made no change in my mind. I still found both prisoners guilty of receiving stolen goods, knowing them to have been stolen. I remanded the prisoners for sentence until after the trial of the next case.”

The case states that the second charge, that of receiving razors, was tried on the 27th of December also, whereupon, upon the same day, the learned Judge made up his mind to find both prisoners not guilty of shop-breaking, but guilty of receiving the stolen property knowing it to have been stolen, though he did not so express himself in open Court at the time, and he remanded both prisoners for judgment and sentence.

On December 30th both prisoners were tried on the third charge and acquitted.

On December 31st the learned Judge sentenced both prisoners to 23 months imprisonment on the first charge, and to the same term of imprisonment on the second charge, the second sentence to run concurrently with the first. These

sentences were not passed until after the trial and dismissal on the previous day of the third charge.

The learned Judge adds: "I came to my finding in the first case before hearing the second case, and I am not conscious that I was biassed in coming to my conclusion on the second case through the knowledge acquired in the hearing of the first and third cases." He also says that "no objection was taken by counsel to the adjournment or to his remanding the prisoners for judgment and sentence until all the cases were tried."

The objection urged before us by counsel for the prisoners to the legality of the convictions was that the learned Judge had mixed up the trials of the several cases in a manner calculated to prejudice the prisoners, and the case of *Hamilton v. Walker*, [1892] 2 Q.B. 25, 67 L.T. 200, was relied on as requiring that the convictions should be quashed. That was a case in which the evidence in support of two different charges was necessarily nearly altogether the same. Here, however, the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and the principal witness was the same in all three, or, at all events, in the first two.

There is some confusion in the learned Judge's statement. He appears to have heard the case for the prosecution only in the first case on December 27th, and postponed the defence until the 30th of that month. And, apparently, he completed the trial of the second case on December 27th. It may be that this is an inaccuracy, and that the defence in both cases was heard on December 30th. But however this may be, I think the case is not governed by the case of *Hamilton v. Walker*, but rather by the later case of *Regina v. Fry*, 19 Cox 135, and 78 L.T. 717, where judgment was postponed on a charge of unlawfully permitting drunkenness to take place on the prisoner's premises until after the trial and dismissal of two other charges of unlawful selling of liquor on his premises on the following day. There the conviction was upheld, and the statement of the justices that at the close of the first case they were of opinion that there should be a conviction was accepted, and weight was attached to the circumstance that the charges subsequently tried were of acts done

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upon a subsequent day. Here, in like manner, I think we ought to accept the statement of the learned Judge that he came to his finding in the first case before hearing the second case, and that he is not conscious that he was biassed in coming to his conclusion in the second case through the knowledge acquired in the hearing of the first and third cases. I think, too, as said by the Court in the *Fry* case, it was easy for the learned Judge to keep the cases distinct, having regard to the difference of time, place, and circumstances between them.

It seems proper to call attention to the observations of Wills, J., in delivering the judgment of the Court in that case as to the caution which ought to be observed in such cases. He said (78 L.T. at p. 717): "We should be sorry to give any countenance to the notion that justices may mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. Such a course would be contrary to law; and undoubtedly, as a general rule, it will be prudent and right for justices to avoid any course which reasonably bears the aspect of such a mistake. If a *prima facie* case is made out that such an error has, or may have been, committed, it will in general be upon the justices to shew very clearly that it has not been committed. On the other hand, we should be equally sorry to throw any doubt upon the right of the justices, in any case, for reasons of justice arising out of the circumstances of the case itself, and for its better determination, to adjourn or to postpone their decision; and if their discretion in this respect be honestly exercised, and not, directly or indirectly, with a view of throwing in facts or evidence which have no legitimate bearing on their decision, it must not be interfered with."

I am of opinion that the appeal must be dismissed.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—The certificate sent in by the learned county Judge is not very carefully drawn, and when compared with that forwarded by him on the motion for leave to appeal, is open to criticism. It may, however, be so read as to shew that no error was committed by him in the manner in which he



disposed of the several charges on which the prisoners were tried before him; and we ought to give faith and credit to it as shewing that he dealt with each charge on the evidence applicable to it, which, from the nature of the charges and the relative evidence, there could not have been the least difficulty in doing.

In the administration of criminal justice it must always be more satisfactory to the public and to the prisoner when there are several charges to be tried against the same person that the Judge should dispose of one before entering upon the other. When this is not done it is only too probable that a difficulty may arise such as we have had in the present instance, to which, unless very clearly removed, it may be necessary to give effect.

I am not, however, prepared to lay it down as a matter of law that when a Judge has adjourned a trial for the purpose of considering the evidence and giving judgment, he is in the meantime precluded from entering upon the trial of another charge against the same person. I can only say, speaking for myself, that it is not desirable that he should do so, not merely for the sake of certainty that he shall not even inadvertently consider or be influenced by evidence in the later case not applicable to the earlier, but also for the purpose of avoiding even the appearance of prejudice in his own mind against the prisoner arising out of facts developed in the later prosecution. In short, a prisoner tried before a Judge ought to be as far as possible in as favourable a position in these respects as he would be if tried before a jury.

Different considerations would probably exist if the decision in the earlier case would form ground in the later for the defence of *autrefois acquit* or *autrefois convict*.

In the case before us I think we must say that we are not satisfied that any miscarriage of justice has occurred, and must, therefore, affirm the conviction. I have considered the following cases: *Queen v. Fry*, 19 Cox Cr. Cas. 135; *The King v. Sing* (1902), 6 Can. Cr. Cas. 156; *Queen v. McBerney* (1897), 3 Can. Cr. Cas. 339; *Reg. v. Staffordshire* (1859), 23 J.P. 486; *Hamilton v. Walker*, [1892] 2 Q.B. 25, S.C. 56 J.P. 583.

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## [IN THE COURT OF APPEAL.]

D. C.

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Oct. 26.

## REX v. HARRON.

*Criminal Law—Obstructing Distress—Onus on Crown to Prove Legality of Distress—Criminal Code, sec. 144 (2)—55-56 Vict. ch. 29 (D.).*

Sec. 144 (2) of the Criminal Code enacts that "everyone is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress . . .":—

*Held*, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as, for example in this case, that there was rent due and in arrear.

THIS was a reserved case granted by Archibald Bell, Esquire, Judge of the county court of the county of Kent, on a question of law arising in certain criminal proceedings before him, as set out in the judgments below.

The case was argued on September 14th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

*J. H. Moss*, for the prisoners, relied on the wording of sec. 144, 2 (b) of the Criminal Code, 55-56 Vict. ch. 29 (D.).

*J. R. Cartwright*, K.C., for the Crown, referred to *Rex v. Finlay* (1901), 4 Can. Cr. Cas. 539; *Reg. v. King* (1889), 18 O.R. 566; *Bevil's case* (1575), 4 Co. 8 a; *Foa on Landlord and Tenant*, 3rd ed., p. 519; *Woodfall on Landlord and Tenant*, 15th ed., pp. 492, 520.

October 26. OSLER, J.A.:—Case reserved from the county Judge's criminal court by the Judge of the county court of Kent county.

The case states that the prisoners were charged for that they did resist and wilfully obstruct Michael Dillon, bailiff of the 7th division court of the county of Kent "in the execution of a lawful distress warrant against the goods of the prisoner John Harron." This is found to have been done, as the case also states, "by locking the said Dillon in the barn, and by rescuing from him animals under seizure by locking the gates and preventing his removal from the said premises of the animals under distress."

The prisoner John Harron was tenant of certain lands of one Graham under a written demise. A warrant in the usual form from Graham to Dillon was proved, authorizing him to distrain for arrears of rent alleged to be due and owing under the lease. The alleged offence consisted in the resistance to the distress, and rescue of animals taken in the name of a distress under this warrant. There was no evidence that the distress had been impounded.

For the prisoners it was contended that in order to prove an offence under sec. 144 (2) (b) of the Code it was necessary for the Crown to shew that the rent was due and in arrear; or at least that the evidence tendered by the prisoners to prove that there was no rent in arrear at the time of the distress should have been admitted. The learned Judge ruled against the prisoners on both points, holding that proof that rent was due was "entirely foreign to the determination of the case," and that the warrant was conclusive as to the rent being due. If it was not due "the prisoners had their civil remedy."

I am of opinion that the learned Judge's ruling was wrong on both points, and that the questions submitted should be answered in favour of the prisoners. Section 144 (2) (b) of the Code enacts that "every one is guilty of an offence . . . who resists or wilfully obstructs any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure."

The last branch of the sub-section is that under which, if at all, the indictment must be maintained, as a distress warrant for rent is not "process," the very definition of such a distress being a taking without legal process. It is of the essence of the statutory offence that the distress resisted should have been a lawful distress, and as the commission of an offence must be established against the accused before he can be convicted, it necessarily devolves upon the prosecution to prove the existence of all the ingredients which go to make it up, one of which, in the case of such a charge as the present, is the legality of the distress. If no rent is due and in arrear it goes without saying that the distress is illegal, whatever may be the civil remedy open to the tenant. It seems therefore almost needless to say more than that, within the very words of the

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Act, if a lawful distress is not proved, the Crown has not established the commission of the offence. The whole section draws a clear distinction between obstructing or resisting public and peace officers in the execution of their duties, or persons acting in the lawful execution of process, and a distress or seizure by a private person such as a landlord or his bailiff or agent.

It has always been lawful for a tenant before the goods seized under a distress warrant have been impounded, to resist their seizure, or to rescue them if there is no rent due: In *Bevil's case*, Co. Rep. part 4, 8 (a) at p. 11 (a), or vol. 2, p. 279, "it was resolved that if nothing is behind, and the lord distrains, the tenant may make rescous." Co. Litt. 160 (b): "Here Littleton decideth an [ancient question in our books, viz., that the rent must be behind, or else the tenant may make rescous—and so it is if the tenant resist the lord to distrain."

Gilbert on Distress, 4th ed., 1823, p. 61: "If the distress be made without cause, the owner may make rescous, yet, if in such case it be impounded, the owner cannot break the pound and retake it, because then it is in the custody of the law." Bradby on Distresses, 2nd ed., 1828, pp. 193-195: "It may be considered as a general rule that wherever a distress is wrongful in its inception, it may be rescued. . . . A rescue may be made of any distress which is absolutely tortious, as if made for rent, whether it be a rent charge or rent service where none is in arrear. . . . It is a general rule that no rescue can be made of a distress after the goods are impounded, for then they are in the custody of the law." Am. & Eng. Encycl., 2nd ed., vol. 9, p. 656: "But if there be anything wrongful in the distress, the tenant may rightfully, rescue his goods before the impounding," citing Co. Litt. 47, 2 Bla. Com. 85; *Parrett Navigation Co. v. Stower* (1840), 6 M. & W. 564; *Cadmus v. Barney* (1880), 42 N.J.L. 346; *Newell v. Clark* (1884), 46 N.J.L. 363. And see *Rex v. Bradshaw* (1835), 7 C. & P. 233, 236; *Reg. v. Brenan* (1854), 6 Cox Cr. Cas. 381; *Reg. v. Pigott* (1851), 1 Ir. C.L. Rep. 471, 478. Perrin, J.: "How can you indict a man for resisting an illegal distress?" Monahan, C.J., "If a man be distrained and no rent due by him, is he not entitled to rescue his goods?"



And to the same effect are the modern text writers. I note Russell on Crimes, vol. 1, 411, 561, citing Com. Dig. vol. 4, p. 343, but it states nothing inconsistent with the authorities I have quoted.

The conviction must be quashed and the prisoners discharged. It is not a case for granting a new trial.

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MOSS, C.J.O., and GARROW, and MACLAREN, J.J.A., concurred.

MACLENNAN, J.A. :—This is a case reserved for the opinion of this Court by the county Judge of Kent, acting under the speedy trials clauses of the Criminal Code.

The charge was an offence, under sec. 144 (b) of this Code, of resisting and wilfully obstructing a bailiff in the execution of a lawful distress, by locking the bailiff in a barn, and by rescuing from him animals under seizure, by locking gates and preventing his removal from the premises of the animals under seizure.

The learned Judge found that one of the prisoners was the lessee of a certain parcel of land under a written lease made by one Graham to him; that Graham issued a warrant of distress to the bailiff to levy for rent alleged to be due under the lease; that the bailiff thereupon went upon the demised premises for the purpose of distraining upon the goods of the tenant to satisfy the claim for rent; and he found the prisoners guilty of the acts charged against them. The case states that no evidence was adduced by the Crown that any rent was due and in arrear, whereupon, upon objection by the prisoners' counsel that in the absence of such evidence no case was made out, the learned Judge overruled the objection. The prisoners' counsel thereupon tendered evidence that there was in fact no rent due or in arrear at the time of the seizure, but this was rejected by the learned Judge on the ground that the distress warrant was conclusive on that point, and that he had no right to go behind the warrant or to receive evidence contradicting it, inasmuch as if no rent was due the prisoners had their civil remedy.

The questions reserved were (1) whether it was the duty of the prosecution to prove that rent was due and in arrear in

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order to constitute the offence; and (2) whether evidence tendered by the prisoners that there was in fact no rent in arrear should have been received.

I am of opinion that the learned Judge was wrong on both points.

The language of sec. 144 (b) of the Code, so far as applicable to this case, is that: "Every person is guilty . . . who resists or wilfully obstructs any person . . . in making any lawful distress or seizure."

There is no similar law in England so far as appears, and no direct authority was cited.

By the common law the forcible rescuing of goods distrained and the rescuing cattle by the breach of the pound in which they have been placed have been considered to be indictable offences: 1 Russell 560; and a distinction is made between a rescue before and after an impounding. The first is properly called a rescue, and the other a pound breach, the latter being regarded as the more serious offence, inasmuch as after being impounded the goods or cattle are regarded as *in custodia legis*. In the present case the cattle had not been impounded, inasmuch as the interference took place when the bailiff was in the act of removing them from the premises; and if no rent was in arrear the seizure was unlawful. In Woodfall on Landlord and Tenant, 15th ed., 521, it is said, and supported by authorities, that "if distress be taken without cause, the party may lawfully make a rescue before it is impounded; but if it is impounded, he cannot justify a breach of pound to take it out; because the distress is then in the custody of the law."

Now if that is so, if a rescue might lawfully be made in case the distress was taken without cause, it follows that on a prosecution the defendant might at least shew that there was no cause for the distress, inasmuch as no rent was due. In Foa on Landlord and Tenant, 2nd ed., pp. 445-6, the subject of rescue and pound breach at the common law is treated and authorities cited, and the author says: "Rescue may be justified in any case where the distress is unlawful, whether from the fact that no rent was due, or that the amount due has been tendered," etc.

It is not actually necessary in this case to determine the first question reserved, for evidence was tendered by the prisoners that no rent was due and it was rejected. If a rescuer at common law could, before impounding, justify by shewing that no rent was due and the distress therefore illegal, it follows clearly that he may do so under our enactment, which defines the offence as resistance or wilful obstruction in making any *lawful* distress or seizure. It is too clear for argument, in my opinion, that it must at least be open to the defendant to prove that the distress or seizure was *not* lawful. The learned Judge laid stress upon the existence of a warrant stating that rent was due, but a landlord may himself distrain, and there need not be any warrant at all, and a warrant must, therefore, be of no moment with reference to the present question.

Having regard to the presumption in favour of innocence in a criminal prosecution, I am also of opinion that it was the duty of the Crown in the first instance to prove that the distress was lawful, as expressed in the statute, in order to make out an offence.

The questions should therefore, in my opinion, both be answered in the affirmative.

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[IN THE COURT OF APPEAL.]

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Nov. 15.

THE WALKERVILLE MATCH CO., LIMITED,

v.

SCOTTISH UNION AND NATIONAL INSURANCE CO.

*Fire Insurance—Signature by agent per proc.—Delegatus non potest delegare.*

*Held*, that the defendants were not bound by a policy which contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company, but which, in fact, was signed but without any authorization by him, in the name of one who had lately been agent, by one of his clerks, who while he was agent was accustomed to sign for him, and this even though the insured might not have known of the cessation of the agency.

Judgment of Falconbridge, C.J., affirmed.

THIS was an appeal from the judgment of FALCONBRIDGE, C.J.K.B., in this action which was brought to recover from the defendants the sum of \$3,038.45 and interest, being the proportion alleged to be payable by the defendants of the plaintiffs' loss by a fire which occurred on May 14th, 1901, in respect of its match factory, machinery, stock, etc., under the circumstances set out in the judgment of this Court.

The action was tried at Sandwich on September 15th, 1902, without a jury, and on October 7th, 1902, judgment was given dismissing the plaintiffs' action without costs, as follows:—

FALCONBRIDGE, C.J.:—There are no material facts in dispute. It is only a question of the proper inference to be drawn from the facts.

Mr. Davis says he ceased to be agent of the company in February, 1901. The special agent of the company, Mr. Rogers, confirms this. He arranged the transfer on February 2nd, made up list of supplies, turned them over to Mallett and took his receipt therefor. True, Mr. Mallett's appointment was to be confirmed when he should have been formally appointed agent of the express company, but meanwhile he was acting as agent and Mr. Davis was relieved. Mr. Davis is the best judge of his own position and he considered himself to be superseded by what took place on February 2nd.



Accordingly we find four days later a permit filled out by Mr. Mezger who had done the clerical work for Mr. Davis, and signed by Mr. Mallett.

Then Mr. Mezger on April 25th assumes to sign the policy in question with Mr. Davis' name ("per C.F.M.," his own initials) just as he had done while Mr. Davis was agent. I have not found authority extending the dictum found in cases like *Trueman v. Loder* (1840), 11 A. & E. 589, to an insurance contract. *Summers v. Commercial Union Assurance Co.* (1881), 6 S.C.R. 19, seems to be against the plaintiffs' contention.

There is a kind of symmetry about the misfortunes of the plaintiffs with reference to this policy. It is not entered in the insurance register, the money for the premium did not reach anyone whom there is any pretence to call an agent of the company until after the fire, and it does not appear that anything was known about the risk at the defendants' head office at Hartford until after the loss occurred.

It does not seem that the plaintiffs can recover.

Action dismissed without costs.

The appeal was argued on September 17th and 18th, 1903, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ. A.

*A. H. Clarke*, K.C., for the plaintiffs, referred to *Trueman v. Loder*, 11 A. & E. 589; *Drew v. Nunn* (1879) 4 Q.B.D. 661; *Confederation Life Association of Canada v. O'Donnell* (1882) 10 S.C.R. 92; *Ottawa Agricultural Ins. Co. v. Sheridan* (1879) 5 S.C.R. 157; Pollock on Contracts (Blacks. ed.) p. 165; Statutory Condition No. 21, R.S.O. 1897, c. 203, s. 168 (21).

*O. E. Fleming* argued that *Trueman v. Loder* is not applicable to insurance cases, and relied on *Summers v. Commercial Union Assurance Co.*, 6 S.C.R. 19; Holt on Insurance, p. 498.

November 15. The judgment of the Court was delivered by MACLENNAN, J.A.:—I am of opinion that this judgment should be affirmed.

The action is on a policy of fire insurance alleged to have been issued by the defendants to the plaintiffs on April 25th,

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1901. A loss occurred on May 14th following, and the defence is that the alleged policy was never issued by the defendants or with their authority.

For about four years prior to February 2nd, 1901, one Davis had been the company's agent at Windsor. He had a clerk in his office named Mezger who attended to the insurance business. Davis was supplied with various blank forms by the company, and amongst them, blank forms of policies, having appended thereto the signature of the general manager of the company at Hartford, Conn., where the head office of the company was situate. The office occupied by Davis was also occupied by the agents of an express company, and Mezger was also a clerk of the express agents. Davis had, prior to February, 1901, expressed to the defendants his desire to be relieved from his agency for them, and at that time one Mallett, who had for about a year been acting as temporary agent for the express company, was then expected shortly to be appointed permanently.

On February 2nd one Rogers, the defendants' district agent, came to Windsor and relieved Davis of his agency, and appointed Mallett in his stead; and thereupon the insurance forms and policies in Davis's possession were all transferred to Mallett, and a list of other documents so transferred prepared by Mezger, was signed by Mallett as having been received by him. Mezger says in his evidence that he did not understand that Mallett had been appointed in Davis's place; but that cannot be believed, for he admits he witnessed, and took part in the transfer of the insurance papers on that day, and four days afterwards he went to Mallett and procured his signature, as agent for the defendants, to a vacancy permission under one of the defendants' policies. It must be taken therefore that on February 2nd Davis had ceased to be agent of the company, and Mallett had been appointed in his stead, all with the full knowledge of Mezger. After this the same office continued to be used by Mallett for the express business, and also by Davis for his own business, and Mezger continued in the employment of Davis as before. About April 25th the plaintiffs were looking for a large sum of insurance upon their property, and employed Walker Sons to procure it for them.

That firm offered a portion of it to one Morton, an insurance agent at Windsor, whose office was next door to that of Davis. Morton could not take all he was offered, and went to Davis's office, and proposed to Mezger a policy in the defendant's company for \$4,000. He says he knew Davis had been the agent of the defendant, but did not know that there had been any change. He asked for and obtained from Mezger a blank policy of the defendants, filled it up in his own handwriting, and got Mezger to sign Davis's name to it. The policy is not a sealed instrument, and it contains this stipulation as part of the attestation clause,—“to be valid, however, only when countersigned by the duly authorized agent of the company at Windsor, Ont.” The countersign is as follows: “Countersigned at Windsor this 25th day of April, 1901. JNO. DAVIS, agent, C.F.M.”

The insurance is expressed to be a portion (\$4,000) of a total insurance of \$86,100, distributed over nine different properties in different sums. The term was for one year from April 25th, 1901, and the premium \$79.80, but the policy contains no acknowledgment of the premium having been paid, nor was it then in fact paid, or at any time afterwards. The knowledge which the defendants had of Mezger's position after February 2nd was derived from a letter written to the head office on the 3rd of July by Rogers, in which he says: “Mallett is popular, well acquainted in Windsor and will, I believe, make a very satisfactory representative. Mr. Mezger, a young fellow in the express company's office, who has been looking after Davis's insurance business for some time past, will remain in the office, and as he is reasonably familiar with our ways of doing business, everything will go along as before.”

At the date of the policy in question the plaintiffs held another policy of the defendants for \$2,500, which Morton says was destroyed, and it does not appear how it was signed, or what property it covered. It is said to have expired on the 5th of May. Mezger says Davis signed some policies himself, and others were signed by him (Mezger) in Davis' name, with his initials appended. Some policies, after they expired, were sent to the company, but he does not remember any

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being so sent which were signed by him (Mezger) with his initials, and there is no evidence that the defendants had any knowledge that any of their policies were issued without being signed by Davis himself.

The fire occurred after midnight, early in the morning of May 14th, and at that time no attempt had been made to pay the premium of \$79.80. On the 14th, after the fire, a cheque for \$71.82 was drawn by Morton payable to Davis, which was tendered to him but refused; and it does not appear that the defendants had any notice or knowledge whatever of the application for or of the issue of the policy until the 15th day of May, when they promptly repudiated it. It is also clear that Mr. Davis had personally no knowledge of the application for the policy or its issue by Mezger, and that he was not consulted with respect to it. It is also argued on behalf of the plaintiffs that no notice having been given by the defendants that Davis was no longer their agent, Morton acting on behalf of the plaintiffs had a right to assume that the agency continued. It is admitted that Morton was ignorant of any change. It was also argued that a card or notice of Davis's appointment was hanging conspicuously in the office, and that it at the date of the policy had not been removed, but that is of no consequence inasmuch as Morton does not say that he saw it, or was influenced in any way by it.

With regard to the want of notice of the change of agency, whatever might have been the proper conclusion if the policy had been signed by Davis himself, the real question for determination is whether the defendants are bound by a policy not signed by Davis himself, but signed by Mezger with Davis's name without any authority whatever from him, and wholly without his knowledge or privity. Assuming that in the absence of notice Morton had a right to deal with Davis as the defendant's agent, he did not in fact deal with him, but with one who never was the defendant's agent at all. Davis was the man they had trusted. The position of an insurance agent is one of responsibility, involving careful and prudent conduct in the transaction of business. The policy expressly required the countersignature of the agent as a guarantee of the desirableness and prudence of undertaking the risk.



Under these circumstances I think Morton was bound to see that Mezger had express authority from Davis to append his signature to the policy, and not having done so he and the plaintiffs for whom he was acting accepted the policy at their own risk, and Mezger not having any such authority, the plaintiffs cannot recover. This conclusion depends on a familiar principle. *Delegatus non potest delegare*. In Leake on Contracts, 1st ed., p. 482, it is said: "It is a general rule that an agent cannot delegate his authority to another without a special authority to do so; as expressed in the maxim *Delegata potestas non potest delegari*. And this rule applies strictly wherever the authority involves a trust or discretion in the agent, for the exercise of which he is personally selected." This statement of the law is borne out by the authorities which the author cites in the notes. He goes on to state the qualification of the rule thus: "But if the agency involves no exercise of discretion, and it is immaterial whether it be done by one person or another, or if the discretionary part of the agency is exercised by the party to whom it is entrusted, a mere act, as the signing of the name, may in general be delegated to and performed by the hand of another: as where a creditor under a composition deed telegraphed to his agent to sign the deed, who in turn required his clerk to sign it, the signature was held to be that of the principal." See also Broom's Maxims, 7th ed. p. 638.

I think the present case comes within the rule and not the exception.

Much was made in argument by appellants' counsel of the letter of February 3rd from which an extract has been made above, written by Rogers to the head office of the defendants, as evidence of the authority of Mezger to act for them. But the obvious answer to that argument is that what was expected and approved of, as expressed in that letter, was that Mezger should act under Mallett, and not any longer under Davis. It is no evidence of authority to him to act, either independently of Mallett, or in the name of Davis, as he assumed to do.

I am therefore of opinion that the judgment is right and should be affirmed.

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IN RE WAGNER.

Dec. 8.

*Distribution of Estates—Devolution of Estates Act—Relations of the Half Blood.*

In the distribution under the Devolution of Estates Act of the real and personal estate of an intestate, brothers and sisters of the half blood share equally with those of the whole blood.

MOTION by the administrator of the estate of Flora Mills Wagner, a deceased infant, for directions as to the distribution of her estate. The main question was whether a sister of the half blood, a daughter of the deceased infant's father by a second marriage, was entitled to one half of the estate, or whether the whole estate passed to the father. The father had, it was alleged, assigned his interest, and a question was also raised as to the validity of that assignment.

The motion was argued before BOYD, C., in Chambers, on the 4th of December, 1903.

*W. S. McBrayne*, for the administrator.

*H. E. Rose*, for the father,

*E. D. Armour*, K.C., for the claimant.

*A. B. Aylesworth*, K.C., for the assignees of the father.

December 8. BOYD, C.:—The Devolution of Estates Act, passed in Ontario in 1886, makes a change amounting to a new rule in the law as to the succession to real estate of persons dying intestate, and declares generally that land shall be distributed as personal property among the next of kin of a person dying intestate. The original section 4 of the Act [49 Vict. ch. 22 (O.)], enacts that "so far as the said property is not disposed of by deed, will, contract, or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed." In the bill introduced for like purposes in England, in 1884, the phraseology of the last part of the section is, perhaps, more explicit of the meaning in directing that the same shall be distributed "among the persons entitled under the Statute of Distributions, as amended by this Act," but the meaning in both is sufficiently

plain that the provisions of the Statute of Distributions, as to personal estate, are to regulate the distribution of land. The same comprehensive change had been made respecting land in many of the Australasian Colonies before this, and the result of such legislation had been construed to the effect above indicated by the Privy Council in *Wentworth v. Humphrey* (1886), 11 App. Cas. 619.

One of the changes made in the law of distribution, alluded to in the "hereafter" of the 4th section quoted appears in the provisions of the 6th section (both sections are found in the Revised Statutes of 1897, ch. 127, secs. 4 and 6) in regard to the case of persons dying intestate without issue, the father surviving. He shall not be entitled to any greater share under the intestacy than the mother or brother, or any sister surviving. That section has to be considered in the present case where the land was owned by an infant who died intestate in 1903. Her mother was dead, but the father had remarried, and, at the death of the intestate, she had a half sister for whom part of the estate is claimed as co-entitled with the common father. Section 6 works by implication, and it has been construed to mean that the father has to share on the intestacy of the child with the brothers and sisters of that child and the children of the deceased brothers and sisters, so that there will be equality of distribution among father and all children (living and dead with issue): *Walker v. Allen* (1897), 24 A.R. 336.

The section has been thus construed as giving, in the case of the father, that which was given in the case of the mother surviving by the statute of James, 1 Jac. II ch. 17, sec. 7, (R.S.O. 1897, ch. 335, sec. 5). The privilege of the parent to take all in certain cases was abrogated, and distribution made among the other next of kin as specified. Now under the statute of James it has been held that brothers and sisters of the half blood are equally entitled to share with those of the full blood: *Jessopp v. Watson* (1833), 1 M. & K. 665. This decision is conformable to the rule which had long obtained in the application of the statute of Charles II as to distribution, whereby the half blood have an equal share with those of the whole blood, and the distinction was at an early date noted between the inferior position of those of the half blood as to descent of land

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as compared with the administration of personal estate, where those of the half blood and whole blood were all one: *Earl of Winchelsea v. Norcliffe* (1686), Vern. 435; Robbins' Devolution of Estates, 3rd ed., p. 296; Armour on Devolution, p. 244.

The Statute of Distribution was drawn by a civilian, Sir Walter Walker, with the intention to supersede by the rules of the Roman law those of the common and canonical law in the division of an intestate's personal estate; *Rex v. Raines* (1690), 1 Ld. Raym. 571; *Mentney v. Petty* (1722), Finch Prec. Ch. 593. Hence it is that in computing the degrees of collateral consanguinity the methods of the civil law are followed. The common ancestor is disregarded, and the reckoning is from the intestate upwards to the father as one degree, and from the father downwards to the intestate's brother as another degree, thus making brother and sister two degrees, whereas in canonical law there is only one. In the civil law, as adopted by the construction of the statute, regard is had to the person in whom the blood meets and those of the half blood are of kindred with those of the whole blood through the one common parent.

Therefore I think it may be taken as a canon of interpretation that the words "brothers and sisters" used in a context relating to a testamentary disposition of personalty or land treated as personalty import and include those of the half blood, if nothing appear to the contrary: *Grieves v. Rawley* (1852), 10 Ha. 63; *In re Cozens*, [1903] 1 Ch. 138.

The proper construction of section 6 of the Act is to read "brother" and "sister" as including one who has either parent in common with another, and nothing in the latter part of the Revised Statutes, chapter 127 (touching the distribution of estates not affected by the Devolution of Estates Act) detracts from this being the meaning of the section in question.

I find, therefore, in favour of the infant being entitled to one half the estate divisible.

An issue should be directed to ascertain who is entitled to the other half, the father, or those who claim as his assignees, under the instrument which he impeaches.

The plaintiff in the issue should be the father who seeks to avoid the instrument he has signed. Costs of that issue reserved, and to be paid out of that moiety.



The costs of this enquiry, as to the parties entitled to the corpus, will come out of that corpus.

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---

[IN CHAMBERS.]

APPLETON V. FULLER.

1903

Dec. 7.

*Parties—Joinder—Several Torts.*

Claims against two or more defendants in respect of their liability for several torts cannot be joined in the same action. Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the same period as its agent, the plaintiffs were ordered to elect as against which defendant they would proceed, and the action was dismissed with costs as against the other.

MOTION by the defendants to compel the plaintiffs to elect as against which defendant they would proceed.

The action was brought to recover penalties under 63 Vict. ch. 24 (O.), against a company called the Eagle Lake Gold Mining Company, and against Fuller as its representative. The statement of claim alleged that the company had carried on business in Ontario without the necessary license and had thereby rendered themselves liable to a penalty of \$50 a day for eighty-seven days, amounting to \$4,300, counting apparently from the 23rd of February, 1903, to the date of the issue of the writ. It further alleged that Fuller had carried on business as the representative of the said company since the 23rd of February, 1903, and had thereby incurred a penalty of \$20 a day for the same eighty-seven days, amounting to \$1,740.

The defendants moved before Mr. Cartwright, the Master in Chambers, on the 4th of December, 1903, as in *Hinds v. Town of Barrie* (1903), 2 O.W.R. 995, for an order requiring the plaintiffs to elect against which defendant they would proceed.

*J. B. O'Brian*, for the defendants.

*S. Casey Wood*, for the plaintiffs.

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December 7. THE MASTER IN CHAMBERS:—In my opinion it is plain that the motion must be allowed. Under Rule 186, as explained in *Hinds v. Barrie*, it is impossible “to join claims against two or more defendants in respect to their several liability for several torts.”

Mr. Wood suggested that in some sense it was really only one tort. But the answer is obvious; either Fuller was acting as agent and thereby violating section 15 of the Act, or else the corporation itself was carrying on business and thereby violating section 14. That this suggestion was not the idea of the pleader is plain from there being a claim against *each* of the defendants and for a *different penalty* in each case. And it was long ago decided in the case of *Hardyman v. Whitaker* (1782), 2 East 573 (n), that although in a proper case several defendants could be jointly sued in a *qui tam* action, only one penalty could be claimed or recovered.

The Act in question must be construed strictly. It nowhere has even a suggestion of both the corporation and its representative or agent being liable in respect of one and the same violation of the provisions as to obtaining a Provincial license. Had there been any intention of any such double liability, it would, presumably, have been clearly and unmistakeably enacted. Even where the statutes are plain the Court does not favour *qui tam* actions. This is shewn, *e.g.*, by the case of *Longeway q.t. v. Avison* (1885), 8 O.R. 357, and cases there cited.

The plaintiffs must elect within fourteen days against which defendant they will proceed, and the action must then be dismissed with costs against the other.

Under section 17 any further action against such other defendant will apparently be barred by lapse of time. It would appear from the statement of claim that the right of action must at the latest have arisen on the 21st of May, when the writ was issued. It may, however, be the case that one or other of the defendants after that date continued to act without a license and so may have incurred further penalties.

[IN CHAMBERS.]

WILLIAMS V. HARRISON.

1903

Dec. 12.

*Writ of Summons—Renewal—Statute of Limitations—Ex Parte Order—Master in Chambers—Local Judge.*

The Master in Chambers has jurisdiction to rescind an order made on the *ex parte* application of the plaintiff by a local Judge for the renewal of a writ of summons, if material evidence has, even unintentionally, been withheld. Such an order was rescinded where on the *ex parte* application the facts that the writ had expired and that the Statute of Limitations had run as against the claim, were not brought to the notice of the local Judge.

MOTION by the defendant Thomas Harrison to rescind an order for the renewal of the writ obtained on the *ex parte* application of the plaintiff.

On the 1st of May, 1900, a writ was issued in respect of four promissory notes, aggregating \$552 for principal and \$220.90 for interest. The first note was due on the 6th of May, 1894, and the others three, six and nine months later.

There were four defendants. The two first were served promptly by the sheriff of the district of Muskoka, who returned the two remaining copies, stating that he had not been able to find those defendants. Judgment was entered against the two served, but nothing further was done until the 26th of August, 1903, when an order was made *ex parte* by one of the local Judges at Goderich, renewing the writ for twelve months from that date. It was admitted that the writ had expired on the 1st of May, 1901, and had not been renewed, and that the plaintiff's remedy was in the meantime barred by the Statute of Limitations.

On the 13th of October, 1903, a notice of motion was served on behalf of the defendant Thomas Harrison for an order to rescind the order of the 26th of August, 1903. This motion came on for argument before Mr. Cartwright, the Master in Chambers, on the 30th of November, 1903.

*T. P. Galt*, for the applicant.

*C. A. Moss*, for the plaintiff.

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December 12. The MASTER IN CHAMBERS (after stating the facts):—The original order was before me and is stated to have been made “on reading the affidavit of E. L. Dickenson filed and upon hearing the solicitor for the plaintiff.” So I must assume that this was all the material before the learned local Judge. What then does that affidavit say? It was also before me and states the facts to a certain extent. But no mention is made of the writ nor of the dates of the notes sued on, nor of the fact that they were all barred on the 6th of May, 1901, more than two years before the order now under consideration.

In *Doyle v. Kaufman* (1877), 3 Q.B.D. 7, affirmed by a very weighty Court of Appeal (1877), 3 Q.B.D. 340 (Bramwell, Brett, and Cotton, L.JJ.), it was held by Cockburn, C.J., and Lush, J., “that the power to enlarge the time cannot apply to the renewal of the writ when by virtue of a statute the cause of action is gone.” This case was followed and approved in *Hewett v. Barr*, [1891] 1 Q.B. 98, by the full Court of Appeal (Lord Esher, M.R., Lopes, and Kay, L.JJ.), where the reasoning of the short judgment of Lord Esher is very cogent. The remarks of Kay, L.J., are not of any weight as against the judgment of the Court of Appeal, in which he concurred.

The last case of this kind in our own Courts is *Canadian Bank of Commerce v. Tennant* (1903), 5 O.L.R. 524. This shews that I am competent to entertain the motion, but that I can only rescind the order of the learned local Judge on the ground that “material evidence was withheld from him on the application.” Now in view of these two English cases and of the decisions in our own Courts I think that this was the case, though I am satisfied that this was not done intentionally.

In the order of the local Judge there is no reference to the writ, nor is it made an exhibit to the affidavit. There is nothing, therefore, to lead one to suppose that the bar of the statute had been brought to the notice of the Judge. Had this been done it is not to be supposed that in face of the authorities the order would have been made. And I therefore feel justified in setting it aside as I would have done had I been led into a similar error, and as I did in *Bolster v. Booth* (1903), 2 O.W.R. 890. Had the fact been brought to the notice of the learned local Judge another question would have arisen which I would



have referred to the Court itself. But as it is, I think I am bound to set the order aside.

*St. Louis v. O'Callaghan* (1889), 13 P.R. 322, is the only case that in any way favours the plaintiff. But it is said there that the affidavit on which the last renewal was granted expressly stated that "the Statute of Limitations had not run against the plaintiff's claim." Had the writ in *Canadian Bank of Commerce v. Tennant* been allowed to lapse and then been renewed in spite of the bar of the statute, I might have followed it. But no such case can be found. And in view of *Hewett v. Barr* I am at a loss to imagine how such an order could be made otherwise than *per incuriam* or from ignorance of the true facts.

I have not overlooked the vigorous contention of the plaintiff's counsel that the discretion of the learned local Judge could not be interfered with. But as was said in effect by Cockburn, C.J., in *Doyle v. Kaufman*, no Judge has discretion to interfere with the operation of a statute. It must, therefore, be presumed that there was no such intention unless the contrary is proved beyond all possibility of doubt.

The motion must be allowed and the order, renewal of writ, and service set aside. I do not, however, think it is a case for costs.

An appeal from this judgment was argued by the same counsel before MEREDITH, J., in Chambers, on the 18th of December, 1903, and was dismissed with costs.

R. S. C.

Master in  
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## [DIVISIONAL COURT.]

## IN RE BAILEY.

*Will—Construction—Legacies—Payment out of Real Estate.*

D.C.

1904

Jan. 5.

A testator by his will devised a farm to each of his sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters and proceeded as follows :—"I give to my wife all the moneys that remains after paying my former bequeaths, debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living :—

*Held*, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville v. Browne* (1859), 7 H.L.C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate.

Judgment of Teetzel, J., affirmed.

APPEAL by Ella Jackson in an application for the construction of a will.

The testator, John Bailey, made his last will on the 1st of September, 1882, and died on the 3rd of October, 1884. By this will he devised to each of his sons named therein a farm, subject to the right of his widow, Ann Jane Bailey, to work and manage the farms for her own benefit until certain dates which he fixed, and subject to the payment to her after these dates of certain sums of money by the devisees. He then gave certain legacies to his daughters and proceeded as follows:—"6. I give to my wife Ann Jane Bailey all the moneys that remain after paying my former bequeaths, debts, and funeral expenses, . . . and all that may accrue from the farm during her term of management to dispose of as she pleases, but if she should die without disposing then I order that the undisposed part be equally divided amongst my sons and daughters then living.

7. I order my executors to sell my undisposed real estate and divide equally amongst my children then living."

The executors applied for the direction and advice of the Court as to whether they were at liberty to pay the legacies to the daughters out of the proceeds of the sale of the real estate not specifically devised to the sons, the personal estate having proved insufficient for the purpose. Combined

with the motion for advice was one for the administration of the estate. The motion was argued before Teetzel, J., and judgment was given by him declaring that the legacies were not payable out of the real estate, and ordering administration of the estate, and giving to all parties their costs out of the estate.

The appeal was argued on the 14th December, 1903, before a Divisional Court [FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.]

*Watson, K.C.*, for the appellant, and the executors.

*George Wilkie*, for the respondents.

January 5. The judgment of the Court was delivered by STREET, J. (after stating the facts):—The general rule is that legacies are not payable out of real estate unless charged upon it by the will. The appellant Ella Jackson, one of the testator's daughters and a legatee, contends that the effect of this will is to charge the legacies to the daughters upon a mixed residuary fund of real and personal estate created by the will. The rule established by the House of Lords in *Greville v. Browne* (1859), 7 H.L.C. 689, is that "if there is a general gift of legacies and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies and that which is afterwards given is given *minus* what has been before given and therefore given subject to the prior gift."

In the present will, however, there is no blended fund; there is a gift to the widow of the residuary personal estate, expressly after payment of legacies, thus pointing out the particular fund intended by the testator for their payment, followed, in a separate clause, by a direction that the undisposed of real estate, that is to say, the real estate not specifically devised, is to be sold and the proceeds divided amongst sons and daughters then living. There is no room here, therefore, for the application of the rule in *Greville v. Browne*.

The appeal must therefore, in my opinion, be dismissed with costs payable by the appellant.

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[IN CHAMBERS.]

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## GIBSON V. LE TEMPS PUBLISHING CO.

Dec. 18.

*Partnership—Foreign Judgment against Corporation—Action on, against Partnership—Recovery of Judgment—Estoppel—Service—Execution against Partners—Rule 228—Issue.*

A judgment was recovered in an action for libel by the plaintiff in a Superior Court of the Province of Quebec against certain defendants sued and described as "La Compagnie de Publication Le Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario." There was no incorporated company in Ontario of that name, but a partnership firm of that name was registered in Ottawa, the partners being F.M. and his wife. This action was begun in Ontario by a writ specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F.V.M., the manager of Le Temps Publishing Company, but without the notice in writing required by Rule 224 informing him in what capacity he was served. Le Temps Publishing Company appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F.M. as "one of the registered partners of the defendants, otherwise called La Compagnie de Publication Le Temps." Upon a motion by the plaintiff for leave to issue execution against F.M. and his wife as members of the defendant partnership, an issue was directed to be tried to determine whether they were members of the partnership and liable to have execution issued against them:—

*Held*, that it must be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. If the Quebec judgment was to be regarded as one against a corporation, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn, but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an unimpeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F.M. and his wife as members of the firm; and, as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed.

THIS was an appeal by Sara Moffet from an order of D. B. MacTavish, Esquire, local Judge at Ottawa, made on the 10th November, 1903, on the application of the plaintiff for leave to issue execution against Flavien Moffet and Sara Moffet as members of the defendant partnership, on a judgment recovered against the partnership, directing an issue to be tried between Gibson as plaintiff and the Moffets as defendants; the question to be tried being whether the Moffets were members of the



partnership, and whether they were liable to have execution issued against them, or either of them, on the judgment.

The grounds of appeal shortly stated were: (1) that the judgment sought to be enforced was null and void by reason of their never having been any service of the writ of summons upon the defendants in the action, or upon the Moffets, or the alleged partnership; (2) that the judgment was recovered upon an affidavit which alleged no ground of action against the defendants in the action as a partnership, or against the Moffets or either of them; (3) that the judgment having been granted improvidently and improperly, and being erroneous, the order applied for should be refused and the judgment vacated, etc.

The appeal was heard by OSLER, J.A., holding Chambers for a Judge of the High Court, at Ottawa, on the 16th December, 1903.

*W. H. Barry*, for the appellant.

*D. J. McDougal*, for the plaintiff.

December 18. OSLER, J.A.:—The proceedings in this action have had a somewhat peculiar course. The action was commenced in the early part of 1902, by writ issued out of the county court of the county of Carleton. It was removed by order of a local Judge (affirmed on appeal) into the High Court. The writ was specially indorsed with a claim for “\$248.47, the amount due on and under a judgment recovered by the plaintiff against the defendant in the Superior Court in and for the district of Ottawa, in the Province of Quebec, on the 4th day of November, 1901,” and was served on Flavien V. Moffet, manager of Le Temps Publishing Company, but without the notice in writing required by Rule 224 informing him in what capacity he was served. Le Temps Publishing Company appeared by the name mentioned in the writ as if sued as a corporation.

A motion for summary judgment was granted on the 4th June, 1902, for the sum claimed in the writ, upon the affidavit of one J. C. Brooke, verifying an exemplification of a judgment recovered in Quebec against La Compagnie de Publication Le

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Temps. Against this order and judgment an appeal was taken before Britton, J., which was dismissed on the 7th June, 1902. From his judgment a further appeal was taken to a Divisional Court. Some of the grounds of both appeals were that personal service of process was in Ontario and not in Quebec; and the appearance thereto was involuntary (*sic*) and defendants should have leave to defend on the merits; (2) that the Court in Quebec had no jurisdiction; (3) the judgment was against public policy, and shews on its face that it treats as a wrong what is not such by our law, etc.; (4) that if the action in the Quebec Court is one for libel, defendants were entitled to notice of action, and the right of action is now barred.

This appeal was dismissed on the 9th September, 1902.

The plaintiff rested until March, 1903, when he obtained an order from Britton, J., to examine Flavien Moffet as a judgment debtor. An appeal to a Divisional Court from this order was also taken, and dismissed on the 7th April, 1903, with an explanatory variation shewing that Moffet was to be examined as "one of the registered partners of the defendants, otherwise called La Compagnie de Publication Le Temps, under Rule 910."

Some of the grounds of objection to the order of Britton, J., were, that the defendants were sued as a corporation on a judgment in the Province of Quebec against them as such, and they had appeared in and defended this action as a corporation, and the plaintiff was estopped from denying that they were a corporation and from taking proceedings against them as a partnership, or otherwise than as a corporation.

The next proceeding was that now in question, by which an issue has been directed to try whether the persons appealing are members of the partnership firm of Le Temps Publishing Company.

Several of the objections are similar to those taken on former appeals, and in addition it is contended that service of the writ in the present action having been made upon the manager of the partnership (if defendants are sued as a partnership), and no notice in writing having been then given to him pursuant to Rule 224, informing Flavien V. Moffet whether he was served as a partner or as a person having the control or management of the partnership business, or in both characters, the judgment

in the action was irregular or void, etc., and the order in question was made without jurisdiction.

From the affidavits and papers before me on the present appeal, it appears that on the 4th November, 1901, a judgment was recovered in the Superior Court of the district of Ottawa, in Quebec, against certain defendants, sued and described as "La Compagnie de Publication Le Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario." The action was for a libel alleged to have been published in the issue of the then defendants' newspaper of the 3rd June, 1901. It was a defended action, but it does not appear whether the quality of the defendants as a corporation was brought in question. A partnership firm by the name of La Compagnie de Publication Le Temps was registered in the registry office of the city of Ottawa in August, 1900, the partners in which, according to the subscribed declaration, were Flavien Moffet and Sara Moffet, his wife. The partnership was dissolved about January, 1903.

It must be assumed that there is no incorporated company in Ontario of the name of La Compagnie de Publication Le Temps, or its English equivalent, as no affidavit on the subject has been filed, though leave was given to do so. Mrs. Sara Moffet makes an affidavit in which she states that she signed a declaration of co-partnership with her husband about August, 1900, by the name of La Compagnie de Publication Le Temps. That she never took any part in and knows nothing about the business. That the writ herein never came to her knowledge, and she never knew that she was in any way liable to be proceeded against until served with notice of motion to issue execution against her. That she never authorized any one to take proceedings or do anything for her in the name of the company; and that she cannot read or speak English.

The objections to the present order resolve themselves into two, namely: (1) that the judgment in this action against the partnership was recovered upon the judgment of a foreign Court against a corporation, and not against the partnership firm now sued, in short, that such judgment disclosed no cause of action against a partnership firm; and (2) that the writ in

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this action having been served upon the manager of the business, and not upon either of the partners, the service was irregular or void because of the omission to serve the notice in writing on the manager informing him in what capacity he was sued, as required by Rule 224.

I have given this matter more consideration than I at first thought was due to it, because on looking through the papers it seemed not improbable that some miscarriage had occurred at an earlier stage of the proceedings. I am, however, quite clear that neither of the objections I have mentioned is open to the defendants on the present motion. It must now be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. I do not know whether the action was intended to be so brought, but it must have been so assumed and held by the Divisional Court when they varied the order of Britton, J., for the examination of Flavien Moffet. The evidence before me is that when the original cause of action in the Quebec suit arose, and when this action was brought, there was a registered partnership firm, the members of which were Flavien Moffet and Sara Moffet, and it has not been shewn that there ever was in truth a corporation of that name in this Province.

If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager : Snow's Annual



Practice, 1902, p. 655; Yearly Practice, 1904, p. 504. Or the firm might have moved to set aside the faulty service on the manager: *Nelson v. Pastorino* (1883), 49 L. T. N. S. 564. Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule 228. He cannot proceed under part (1), clauses (b) or (c), because no one who has been served with the writ has appeared in his own name, or has admitted on the pleadings that he is, or has been adjudged to be, a partner, and because there is no one who has been individually, that is personally, served as a partner with the writ and who has failed to appear. He, therefore, proceeds under part (2), and applies for leave to issue execution against Flavien Moffet and his wife as being persons other than those mentioned in part (1) (b), (c), who are members of the partnership. As they dispute their liability, the question, not of the validity of the judgment against the firm, but of their liability as members of the firm to execution thereon, is to be determined, which will be done by the issue directed by the order appealed from. I refer to *Ex parte Young* (1881), 19 Ch. D. 124; *Jackson v. Litchfield* (1882), 8 Q.B.D. 474; *Adam v. Townend* (1884), 14 Q.B.D. 103; *Ex parte Ide* (1886), 17 Q.B.D. 755, 758.

The appellants relied upon *Standard Bank v. Frind* (1893), 15 P.R. 438, and *Munster v. Cox* (1885), 10 App. Cas. 680, but those cases are of no assistance to her now. They shew what the practice is up to judgment and afterwards in proceedings against a firm and the persons who compose it, but they do not decide that any irregularity in the mode of obtaining a judgment, regular on its face, against the firm, can be taken advantage of on the motion for leave to issue execution. *Turcotte v. Dansereau* (1897), 27 S.C.R. 583, is a decision on the practice under the Civil Code, Quebec. While in principle it may be of use to the appellants, or one of them, on a substantive motion against the judgment, it shews that under the jurisprudence of that Province, as under ours, that is the proper way to attack the judgment.

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Whether it may not be still open to Mrs. Sara Moffet, under the circumstances, to obtain relief by a direct motion against the judgment on her own behalf, I cannot say. Flavien Moffet has had and lost more than one opportunity of shewing the facts, and on his second appeal to the Divisional Court the judgment was, as against him, treated as a judgment against the registered partnership firm.

The appeal must be dismissed, and I suppose with costs.

E. B. B.

[IN CHAMBERS.]

RE ADAMS.

1903

Dec. 28.

*Distribution of Estates—Devolution of Estates Act—Next of Kin—Collateral Relatives—Per Capita Distribution—Half Blood—Double Blood.*

An intestate was possessed of both real and personal property, and left no wife, child, father, mother, uncle, or aunt. His next of kin were cousins, some of whom were the children of his father's half brother, and one of whom was the niece both of his father and mother :—

*Held*, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now distributable. Collateral relatives in the same degree of kinship take equally in their own rights, not by way of representation ; those of the half blood take equally with those of the whole blood ; and those of the double blood take no more.

MOTION by James Rowe Philp, administrator of the estate of Arthur James Adams, deceased, for an order under Con. Rule 938 determining certain questions with regard to the distribution of the estate.

The affidavit of the applicant stated that the estate of the deceased consisted partly of land and partly of personalty ; that some of the lands of which he died possessed came to him under the will of his father, and some by descent from his mother ; that he left no real estate which was acquired by himself ; that the personal estate left by him was insufficient to pay all his debts ; that the deceased left him surviving no wife, children, father, mother, or uncles ; that his nearest of kin were his cousin Elizabeth Ann Davy, daughter of his father's brother, his cousins George Adams, Mercer J. Adams, Mrs. Clougher, and Mrs. Seymour, children of his father's half-brother, and his cousins Thomas Bennett and Mrs. Engle, children of his mother's brother ; that Elizabeth Ann Davy was the daughter of the deceased mother's sister, and therefore his cousin through both his father and mother ; that the whole estate had been converted into money and the debts paid ; and that the amount of the estate for distribution was \$2,220,85.

The following questions were submitted by the applicant :—

1. Who are entitled to share in the distribution of the surplus of the estate ?

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2. Is the distribution affected by the fact that some of the real property came to the deceased on the part of his father and some on the part of his mother ?

3. Are Thomas Bennett and Mrs. Engle, cousins on the mother's side, entitled to share with the other cousins who were related to him on his father's side ?

4. Are the cousins to take in equal shares per capita or are they to take per stirpes ?

5. Is Elizabeth Ann Davy entitled to any greater share than the others by reason of her being a double cousin ?

6. Are the children of the deceased's father's half-brother entitled to share, and if so in what proportions ?

7. If George Adams is entitled to share, should his portion be paid into Court, his place of abode being unknown ?

The motion was heard by MEREDITH, J., in Chambers, on the 18th December, 1903.

*J. E. Farewell*, K.C., for the administrator.

*E. D. Armour*, K.C., for Elizabeth Ann Davy.

*G. C. Campbell*, for Mercer J. Adams, Mrs. Clougher, and Mrs. Seymour, and, by order in Chambers, for George Adams.

*George Bell*, for Thomas Bennett and Mrs. Engle.

The following cases were referred to : *Fielden v. Ashworth* (1875), L.R. 20 Eq. 410; *Watts v. Crooke* (circ. 1730), Show. P.C 108; *Smith v. Tracy* (1676), 1 Mod. 209; *Lloyd v. Tench* (1750), 2 Ves. Sen. 213; *Moor v. Barham* (1723), referred to in a note to *Blackborough v. Davis* (1701), 1 P. Wms. 53; *Mercer v. Morland* (1758), 2 Lee Cas. Ecc. 499; *Brown v. Wood* (1648), Aleyn 36; *Smith v. Tracy* (1678), 1 Ventr. 323; *Collingwood v. Pace* (1672), 1 Ventr. 413, 424; *Cotton v. Scarancke* (1815), 1 Mad. 45; *Grieves v. Rawley* (1852), 10 Hare 63; *Baker v. Chalfant* (1840), 5 Wharton (Pa.) 477, 481; *Gardner v. Collins* (1829), 2 Pet. (U.S.) 58, 87; *In re Natt* (1888), 37 Ch. D. 517; *Gundry v. Pinniger* (1851), 14 Beav. 94.

December 28. MEREDITH, J.:—Under the Devolution of Estates Act all the property in question is to be distributed as personal property is now distributable. And among collateral



relatives in the same degree of kinship it is so distributable equally. They take in their own right, not by way of representation. And there is no question of quantity or quality of blood; those of the half-blood take equally with those of whole blood; and those of the double blood—if I may so name a relationship, in the same degree, on the part of both father and mother—take no more, for all are akin to the intestate, and all in the same degree of kinship.

These observations, applied, of course, only to such circumstances as those stated in this case, cover all the grounds of this motion, and answer all the substantial questions propounded in it.

Order accordingly, that is, that all parties are entitled equally to the residue of the estate in question; costs out of the estate, as usual; and providing for payment into Court of the share of the absent party, if desired.

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## [DIVISIONAL COURT.]

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Dec. 29.

## GRAHAM V. BOURQUE.

*Chose in Action—Assignment of Money Payable “in Respect of the Contract”—  
Damages for Interference with the Work—Attachment of Debts.*

*Held*, affirming the decision of Street, J., 6 O.L.R. 428, that the assignment to the claimants of moneys to become due and payable “in respect of a certain contract” for municipal drainage work, included the damages awarded to the contractor by the judgment in *Bourque v. City of Ottawa*, 6 O.L.R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor.

APPEAL by the judgment creditor, Alexander Graham, from the order of Street, J., *ante* 428, allowing the appeal of the claimants, the Bank of Ottawa, from an order of the Judge of the county court of Carleton directing payment over by the garnishees, the corporation of the city of Ottawa, to the judgment creditor, of moneys attached as due to the judgment debtor, and claimed by the bank under an assignment. The appeal was on the ground that the moneys in question were not covered by the assignment made by the judgment debtor to the bank. The facts are stated in the judgments.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ., on the 9th November, 1903.

*A. B. Aylesworth*, K.C., for the appellant.

*W. E. Middleton*, for the claimants.

December 29. MACMAHON, J.:—Bourque had entered into a contract under seal with the city corporation to construct section 3 of a system of main drainage in the city of Ottawa for a lump sum, as to all the work but rock excavation, for which \$2.50 a yard was to be paid. By the terms of the contract the corporation were not to be liable for any damage by the intersecting sewers in the streets through which Bourque's contract extended.

In the course of the work, municipal sewers were met with running along, not across, the streets in which Bourque had to make his excavations; the existence of these sewers was not communicated by the corporation of Ottawa to him, and he was

unaware of their being under the streets until he came upon them. The sewage and water from them, when the sewers were displaced, as they had to be in order to complete the work, flowed into the trenches which Bourque was excavating, and impeded the work, as well as caused him expense in getting rid of the sewage and water, as he was compelled to do in order to go on with his work.

In an action by Bourque against the city of Ottawa to recover damages occasioned by the contents of such sewers flowing into the trenches dug by him and impeding and delaying him in the work and causing him additional expense in the doing of it, which was tried before the learned Chief Justice of this Division, he held that, as the existence of these drains running parallel to the drain he had contracted to construct was not known to and was not disclosed to Bourque, the discharge by the city of the contents of these sewers into the trenches which Bourque was required to dig was damage for which the city should make compensation to him, and he assessed the damages at \$2,810,50. (See 6 O.L.R. 287).

In order to enable him to carry out his contract, the Bank of Ottawa agreed to make advances to Bourque, and as security therefor he on the 11th November, 1899, assigned to the bank "all and every sums or sum of money now due or to become due and payable to me by the corporation of the city of Ottawa, in respect of a certain contract existing between myself and the said corporation of the city of Ottawa, for the construction of section three (3) of the main drain in the said city of Ottawa."

There is also a power of attorney from Bourque to the bank authorizing it to receive the moneys due and accruing due under the assignment.

It was contended by counsel for the appellant that an assignment of "all and every sums or sum of money . . . to become due and payable . . . in respect of a certain contract . . . for the construction of section 3 of the main drain in the city of Ottawa" would not include the damages awarded to the plaintiff against the city of Ottawa, as these damages must be regarded as something *dehors* the contract, and therefore not included in the assignment.

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This case, in some of its features, is not unlike that of *Bush v. Trustees of Whitehaven* (1888), only reported in 52 J.P. 392, and Hudson on Building Contracts, 2nd ed., vol. 2, p. 121, and is governed by the principles enunciated in that case.

In that case Bush contracted with the defendants on the 23rd June to lay a certain conduit pipe, and the defendants agreed to be ready at all times to give Bush possession of the sites to enable him to proceed with the construction of the works. The plaintiff began work on the 12th July, but the whole of the land was not available until the 6th October. In consequence of this delay, the work was thrown into the winter months, and the contractor was put to heavy extra expense, for which he sued the defendants.

The conditions upon which the works were performed and binding on the contractor were very stringent, section 11 providing, *inter alia*, that "the non-delivery in the manner aforesaid of the use of any such site, or any part thereof, shall not vitiate or affect the contract, nor any provision therein or in this specification contained, nor entitle the contractor to any increased allowance in respect of money, time, or otherwise, unless the engineer may grant him any extension of time, and then only to that extent under the provisions for that purpose hereinafter contained."

Section 22: "The contractor shall complete and deliver up to the trustees the whole of the works within a period of, etc.

. . . Provided always, that if by reason of the non-possession of the site required for the purposes of the work, or by reason of any additions to the work (which additions the engineer is hereby authorized to make), or in consequence of strikes or other unavoidable circumstances, the contractor shall, in the opinion of the engineer, have been unduly delayed, it shall be lawful for the engineer, if he shall so think fit, to extend the time, without thereby prejudicing or in any way affecting the validity of the contract or the sufficiency of the tender, or the adequacy of the sums or prices therein mentioned."

The case was tried before Cave, J., and a special jury. The learned trial Judge submitted a number of questions to the jury, the 5th of which was: "Were the conditions of the contract so completely changed, in consequence of the defendants' inability



to hand over the sites of the work as required, as to make the special provisions of the contract inapplicable?" The answer was "Yes." (Hudson, p. 122.) The damages suffered by reason of the inability of the defendants to hand over the sites required for the purposes of the work were £600 over and above the contract price (Hudson, p. 122); and judgment was entered for the plaintiff for £893, the aggregate amount that was found to be due from the defendants (52 J.P., p. 394.)

Notwithstanding the rigorous conditions contained in the 11th and 22nd clauses of the contract, which shewed that the parties had in their minds the contingency of delay, it was held that a summer contract having by implication been in the contemplation of the parties when the contract was made, Bush was entitled to a *quantum meruit* or damages in respect of the increased expenditure which he was thereby compelled to incur.

Lord Chief Justice Coleridge in his judgment, at pp. 126-7 of the report in Hudson, said: "It was therefore, in the first place, a contract to be completed within four months from the 12th July—what may be called, in the popular language which has been used, both from the Bench and at the Bar, a 'summer contract'. It was turned into a winter contract—into a contract when wages were different, probably, or may have been; when days were short instead of long; when weather was bad instead of good; when rivers which had to be dealt with, and had to be crossed by the pipes, were full or empty; and when, in fact, I will not say every circumstance, but a great many most important circumstances, under which the contract was to be executed, had wholly changed from those which, it is reasonable to suppose, were in the contemplation of both the parties when the contract was entered into. The contract, nevertheless, was carried on and was completed. It was carried on and was completed, of course, with the knowledge of the contractor, and equally, of course, with the knowledge of the defendants. The defendants knew as well as the contractor that the work was being carried on under totally different circumstances to those contemplated in the contract. They knew that perfectly well, and although the plaintiff possibly or probably might at the expiration of the four months have thrown the contract up and refused to proceed, he had also a perfect right, if he had thought

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fit, with the knowledge and assent of the defendants, which in this case is to be presumed, and, indeed, was proved, to go on with the contract and to complete it under the altered conditions, or I will not say to complete the contract, but to complete the work under the totally altered conditions that had arisen."

The case was carried to the Court of Appeal, and Lord Esher, M.R., in his judgment, at p. 128, said: "Now the answer to the 5th question (if you take it to be a binding finding of the jury), in my opinion, comes to this, that the condition of things had so been altered after the making of the original contract (they had been so greatly altered) that it was not reasonable, or right, or fair, or just to hold that the original contract was made with regard to those circumstances. In other words you may put it thus, that the condition of things was so altered that if they had been supposed to be the things with regard to which the first contract was made, neither party acting as (I must use my favourite phrase) "reasonable men of business" could have made the original contract in the terms it was with regard to that state of circumstances. The result of that, if it is true, is this, that the original contract is made with regard to a different subject matter from the subject matter which was dealt with by the parties. If that finding stands, then the condition of things with which the parties dealt ultimately was so very different from the condition of things with regard to which the original contract was made, that the circumstances with regard to which the original contract is made have ceased to exist. The contract made with regard to those circumstances ceases to exist because those circumstances have ceased to exist. Then the contract is at an end, and there is no further application of it at all.

"Then with regard to the new circumstances, the parties are in the same position as if no contract at all had been made with reference to them. Now what is the result? Why, that, with regard to the new circumstances, neither party is called upon to do anything. Either party or both parties may leave those circumstances alone. If they do not leave them alone, and undertake to deal with them, and do deal with them, the law applicable to what they then do with regard to those new circumstances is the law which would be applicable to those

circumstances even though there had never been the former contract at all, which was made with regard to other circumstances.

“Now what is that? In that case, as I say, both parties might have left the thing alone, but they do not. The one party goes on to deal with the new state of circumstances and does work with regard to those. The other party knows that that party is dealing with that new state of circumstances and allows him to do so. Therefore the one does work which he intends to be for the other. The other person allows him to do that work, knowing that it is intended to be done for him. It is work which he knows that the one party is doing upon the terms of being paid for it somehow. What does that give rise to? It gives rise to a claim for a fair remuneration for that work done. That fair remuneration is called in legal language a payment according to a *quantum meruit*. If the first contract was gone, if the state of circumstances with regard to which it was made were really no longer in existence as between the parties, if the one did work for the other upon the new state of circumstances which the other accepted, knowing that it was being done on the terms of being paid for, that gives rise to a *quantum meruit*.”

Apparently neither Bourque nor the corporation of the city of Ottawa contemplated that these parallel sewers which were encountered during the progress of the work would require to be displaced in order to complete the work Bourque had contracted to do. The existence of these sewers in the places where they were encountered entirely changed the condition of the contract. Being impeded by the act of the city corporation in discharging through these sewers the sewage matters which they carried on to his work, he might (to quote the language of Lord Chief Justice Coleridge in the Bush case, at p. 127) “have thrown the contract up and refused to proceed, and he had also a perfect right, if he had thought fit, with the knowledge and assent of the defendants, which in this case is to be presumed . . . to go on with the contract and to complete it under the altered conditions, or I will not say to complete the contract, but to complete the work under the totally altered conditions that had arisen.”

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As Bourque could not have completed the contract or become entitled to the moneys payable thereunder without doing the additional work caused by the discharge of the sewage into the trenches dug by him, owing to a breach of duty on the part of the corporation of Ottawa, it appears to me that the additional expense so caused was to enable him to complete the work, under the altered conditions which had arisen, and was therefore "in respect" of the contract. The amount recovered in the judgment of *Bourque v. City of Ottawa* is therefore covered by the assignment to the bank to the extent of the balance due the Bank on the advances made to Bourque in connexion with his contract.

The appeal must be dismissed with costs.

MEREDITH, C.J. :—I agree in the result. Though the form of the recovery by Bourque for the additional work occasioned by the sewers being met with may be as damages for the wrongful interference of the corporation with him in doing the work which he contracted to do for it, in its essence it is for damages for the breach of the implied covenant of the corporation, as my brother Street puts it in the reasons for his judgment, and therefore the liability arose directly under the terms of the contract, and the moneys in question passed by the assignment to the respondents.

It would be a strange result if, having made the assignment of the moneys coming to him "in respect" of the contract, Bourque could, by the form in which he chose to present his claim, prevent his assignees from receiving that which, had he chosen to present the claim in a different form, they would clearly have been entitled to, and which, whatever may have been the form of the claim made, was, in substance, a claim for work done in constructing the sewers which by the contract he undertook to make. Having made the assignment, it was, I think, for his assignees and not for him to determine in what form the claim should be presented, and, if necessary, enforced; and I know of no principle upon which we are bound to hold that the language of the assignment is to receive so narrow a construction as to produce the result which would flow from a decision in favour of the appellant.



Doubtless, as Mr. Aylesworth contended, had a stranger done the act which caused the injury to Bourque, his liability would have been one arising *ex delicto*, but it does not at all follow, I think, that in this case, where the act was done by the body with which he had contracted to construct the sewers, and which was under an obligation *ex contractu* to do nothing prejudicially to interfere with him in the doing of the work, his claim to be indemnified is not one "in respect" of the contract. The claim existed before it was presented to the corporation or put in suit, and as soon as it arose, if covered by the words of the assignment, it passed to the assignees. It was certainly, in its aspect of a claim for breach of the implied covenant, one which was covered by the terms of the assignment, and therefore passed to the assignee; and the fact that Bourque chose to prosecute it as a claim arising *ex delicto* cannot have the effect of withdrawing it from the operation of the assignment, which *ex hypothesi* had taken effect upon it.

It is for this reason that I think, as I have said, that it was for the assignee and not for Bourque to determine in what form the claim should be presented and if necessary enforced.

TEETZEL, J. :—I agree.

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CROWDER V. SULLIVAN.

Dec. 19.

*Promissory Note—Illegal Consideration—Contract in Restraint of Marriage—Insanity.*

The only consideration for the making of a promissory note for \$1,500 by the defendant's intestate in favour of the plaintiff was an agreement on the plaintiff's part not to marry L. or any other man as long as the intestate should live. She was about 30 years old, and was his cook and housekeeper; he was about 60 years of age, and apparently in excellent health; but three months after he made the note he became insane, and died a year later:—

*Held*, that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it.

On the evidence, the issue raised as to the capacity of the deceased at the time the note was made was found in favour of the plaintiff.

ACTION upon a promissory note tried before STREET, J., without a jury, at Cornwall, on the 30th November and 1st December, 1903. The facts are stated in the judgment.

*D. B. Maclellan*, K.C., and *C. H. Cline*, for the plaintiff.

*J. Leitch*, K.C., and *W. B. Lawson*, for the defendant.

December 19. STREET, J.:—The action is brought upon a promissory note for \$1,500, dated on 19th September, 1900, made by Albert Rose, payable three years after date to the plaintiff or bearer, with interest at 5 per cent. per annum. The plaintiff is an unmarried woman, and the defendant is the administrator of the estate of Albert Rose, the maker, who died after the making of the note.

The defences relied on are: 1st, that there was no consideration for the making of the note, or, if any, that it was illegal; and 2nd, that at the time of the making of the note the maker, Albert Rose, was of unsound mind and incapable of appreciating or understanding his act.

The plaintiff had for some years prior to the date of the note been living in the service of the deceased Rose as his cook, and to a large extent also as his housekeeper. He was a widower with one daughter, who was of tender years. He was a man of very considerable means, and his estate was admitted to be worth \$15,000 beyond his liabilities. In 1893 a farmer named Levere, living in the neighbourhood, paid his addresses

to the plaintiff, and they became engaged to be married ; they were to be married in three years, but when the time came she postponed the marriage until the spring of 1897, when she broke off the engagement, telling Levere that Rose could not do without her, and that she would not leave him. Rose had in fact been endeavouring for some time to induce her to break off the engagement, and finally told her that if she would not marry and would remain with him as long as he lived, he would give her either \$1,000 in cash, or a note for \$1,500, or would provide for her in his will, the option being his. She said that it was in consequence of this promise that she broke off the engagement with Levere.

In the spring of 1898 another man, Robert Rose, a distant relative of the deceased, wished to marry her and spoke to the deceased about it; the deceased, however, told him it would not be of any use to speak to the plaintiff about it, as he had made arrangements with her to remain with him while he lived. The plaintiff stated that the deceased referred to his promise several times in the interval between the time it was made in 1897, and the making of the note in September, 1900 ; that she knew he was a man who would keep his word ; and that she was not surprised when he dictated to her the note, which was in her handwriting except the signature, on the day on which he signed it and delivered it to her. She was in the habit of writing his letters and keeping his accounts. The deceased became violently insane suddenly on the 28th December, 1900, and was taken to the asylum on the 22nd February, 1901, and died there in November, 1901.

The plaintiff said that until the deceased gave her the note she did not know whether he intended to give her the \$1,000 cash, or the \$1,500 note, or to make provision for her by will. The plaintiff had been hired by the deceased originally at \$8 a month, and her wages were never increased, but they were regularly paid her at that rate.

It appears, therefore, that the only consideration for the giving of the note was the agreement made in 1897. Put shortly, that agreement was that if she, the plaintiff, would not marry Levere or any other man so long as the deceased lived, but would remain with him during his life, he would do one or

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other of the three things above mentioned; and the plaintiff claims that, having kept her promise, there was a good consideration for the note. It is plain that this is not a matter of mere wages, but a bonus to the plaintiff for abandoning her prospect of marrying during the life of the deceased, and, instead, remaining in the service of the deceased.

The deceased at the time of the promise was about 60 years of age and apparently in excellent health. The plaintiff at the time was a young woman of the age, I think, of 28 or 30.

I think this was a contract in restraint of marriage for an unreasonable period, and that the consideration for the note was therefore an illegal one, and that no recovery can be had upon it: *Lowe v. Peers* (1768), 4 Burr. 2225; *Hartley v. Rice* (1808), 10 East 22.

I find the issue raised as to the capacity of the deceased at the time the note was made, in favour of the plaintiff. The medical experts thought that the form of insanity with which the deceased was afflicted on the 28th December, 1900, and of which he subsequently died, was probably affecting him at a period earlier than the date of the note. Their evidence was entirely theoretical, and against it was the evidence of the defendant Sullivan and that of William Mullin. These gentlemen were in the habit of transacting matters of business for him, and knew him intimately. Both of them had long conversations with him after the date of the note, and Mr. Sullivan transacted some important business with him in October, 1900, and neither of them observed any signs of lack of ability or other signs of mental failure in him. There was also the evidence of Dr. Sidney Porter, who attended him every day from the 21st November to the 5th December, 1900, for an injury to his leg; he says that it never occurred to him that he was suffering from any mental trouble. If this had been the only issue, I should therefore have given judgment for the plaintiff for the amount of the note.

Upon the first ground, however, the action must be dismissed with costs, except those of the issue found in the plaintiff's favour; those costs are to be set off by the defendant.



[IN CHAMBERS.]

RE DELLER.

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Dec. 24.

*Will—Construction—Devise—Absolute Gift—Conditional Gift over—Validity—Disposition of Corpus—Income—Executor.*

A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty:—

*Held*, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law.

MOTION for directions under R.S.O. 1897, ch. 129, sec. 9 and Con. Rule 938.

By his last will and testament Gregor Deller, who died on the 23rd May, 1886, devised as follows:—

(1st) There shall be paid out of my estate for the chapel on the burying ground at St. Agathe in ten years Fifty \$50 dollars.

(2nd) My wife, *née* Catharine Kittel, shall have the whole of my estate which remains at my decease however with the observation that should she marry again then she shall only receive the third part and the residue shall be equally divided between my five children, namely: 1. Ottilia; 2. Alexander; 3. Emma; 4. Ellora; 5. Maria Anna.

(3rd) I appoint as my executors my friends John Deller and Wendel Kittel, and I empower them to do all things in my name necessary to be done and I consider it the same as if I had done it myself.

(4th) Revokes all former wills.

Probate of the will was duly granted on the 24th February, 1888, to the executors named therein.

The affidavit of John Deller, the sole surviving executor, stated that Maria Anna Dehler (or Deller), one of the children of the testator, died on or about the 24th September, 1888, intestate and without issue; that Catherine Dehler (or Deller) the widow of the testator, had not married again, and claimed

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to be entitled under the will to all the residue of the estate (about \$1,600) remaining after payment of the legacy of \$50 and the debts and funeral and testamentary expenses of the deceased; that the four surviving children of the testator claimed that two-thirds of the said residue should remain in the hands of the executor in order to be paid over to them in case the said Catharine Deller should marry again; that the deponent was desirous of winding-up the estate and to pay over the residue to the said Catharine if she was entitled thereto.

The motion was heard by OSLER, J.A., sitting in Chambers for a Judge of the High Court, on the 13th November, 1903.

*E. P. Flintoff*, for the executor.

*Frank Denton*, K.C., for the widow.

*G. R. Geary*, for the children.

December 24. OSLER, J.A.:—All parties interested were represented by counsel on the argument.

It was stated that the property of the testator consisted wholly of realty.

For the widow it was contended that the gift to her was absolute, and the condition void or repugnant, so that she took the whole residue untrammelled by the condition. For the children it was argued that the condition was valid, and that, in the event of her marrying again, the widow's interest was cut down to one-third, the remaining two-thirds in that event passing to them.

I am of opinion that the contention of the children must prevail.

The words of the 2nd clause of this will are sufficient to create a condition; indeed the contrary was not argued; and that such a condition is valid is settled by a long line of authorities. I cite a passage from the judgment of James, L.J., in *Allen v. Jackson* (1875), 1 Ch. D. 399, 403: "What is called a general restraint upon marriage is against the policy of the law. . . . That is the law both as to man and woman; but it has been most distinctly settled that with regard to the second marriage of a woman" (and by the case now cited of a man also), "that law does not apply, that whether the gift be a gift to a

widow by a husband or a gift to the widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid." See also *Cowan v. Allen* (1896), 26 S.C.R. 292, 313, *per* Strong, C.J.

The condition then being valid, the true construction of the clause, in my opinion, is that there is an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds of it if she marries again. So that until this event happens, or if it never happens, no one but the widow can be entitled. Nevertheless, as the event provided against may happen, it follows that the executor cannot safely or properly pay over to her more than one-third of the corpus, and must retain the remaining two-thirds, paying her the income or interest until her death or marriage, when it will fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law.

The case of *McCulloch v. McCulloch* (1862), 3 Giff. 606, is much in point. Cases like *Perry v. Merritt* (1874), L.R. 18 Eq. 152, *Lloyd v. Tweedy*, [1898] 1 I.R. 5, *In re Jones*, [1898] 1 Ch. 438, have no application except in so far as they tend to support the view, in which I agree, that the widow's interest is not a mere life estate in the property devised. They do not deal with the effect of such a condition as we have here.

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RE NORTH YORK PROVINCIAL ELECTION.

Dec. 28.

KENNEDY V. DAVIS.

*Parliamentary Elections—Controverted Election Petition—Examination of Respondent for Discovery—Inquiry into Corrupt Practices Committed at Former Election—Scope of—Lengthy Examination—Discretion—Adjournment—Continuation.*

Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question.

Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion was alleged to have been renewed at the election in question:—

*Held*, that the question should be answered.

If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.

Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it:—

*Held*, that the respondent must attend for further examination.

MOTION by the petitioner to compel the respondent to attend at his own expense and submit to be further examined and to complete his examination for discovery, and to answer a certain specified question, and also all questions relating to or connected with allegations of matters of a corrupt character practised by the respondent or his agents at the Provincial election of May, 1902, for the same riding, as well as all questions having reference to similar acts connected with the election which was the subject matter of the present petition.

The motion was heard by OSLER, J.A., in Chambers, on the 24th December, 1903.

*S. B. Woods*, for the petitioner.

*A. B. Aylesworth*, K.C., for the respondent.

December 28. OSLER, J.A.:—The main question argued was whether the respondent was liable to make discovery of corrupt practices committed by himself or his agents at the election of 1902. At that election the respondent and Mr. T.



H. Lennox were candidates, and the respondent was returned as being duly elected. A petition against his return was presented, in which one of the present petitioners was also a petitioner. A cross-petition against Mr. Lennox was also presented. Both petitions came on for trial before an Election Court in January, 1903, and were then tried and dismissed, and the Court certified that the respondent Davis was duly elected and returned as member for the electoral division. Some time afterwards the respondent resigned his seat, and a new election was held, at which he and Lennox were again candidates. The respondent was again returned, and against that return the now petition was presented and is pending. The election of 1902 not having been set aside or avoided, sec. 171 (3) and sec. 179 of the Election Act need not be referred to. It was, on the contrary, upheld and affirmed and certified to be a good and valid election. That determination is, by sec. 55 of the Controverted Elections Act, final to all intents and purposes, and the present election, not having been held in consequence of the avoidance of the election of 1902, is a new election disconnected from and not a part of or continuance of the former election: *Cornwall Election (Dom.)* (2) (1875), H.E.C. 647; *Borough of Dungarvan* (1854), 2 P.R. & D. 300, 309.

As I read these cases and the cases of *Stevens v. Tillett* (1870), L.R. 6 C.P. 147, 161, 162, 165, 175, and *Waygood v. James* (1869), L.R. 4 C.P. 361, corrupt practices said to have been committed by the now respondent at the former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, now be inquired into for the purpose of invalidating the present election. Therefore, in so far as it is sought to permit a general inquiry on this examination into such corrupt practices, I hold, as at present advised, that there is no such right, unless it can be shewn that they are in some way connected with and are still operative upon the present election.

In *The Windsor Case* (1874), 2 O'M. & H. 88, the question was whether acts of intimidation by an employer against his workmen at a former election could be given in evidence on a petition against a subsequent election. The evidence was admitted, not on the ground that they were corrupt practices

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at the previous election, but because, under the circumstances, they were or might be still operative in the minds of the workmen. "Unless you can shew," said Baron Bramwell (p. 92), "that the bribery or threat is one the force of which is still in existence, it is not a bribe or threat which will avoid the election."

To that extent, therefore, the examination sought may be proper; at least I do not see my way to restrain it, in the absence of any specific inquiry or question, which, except in the instance I shall presently refer to, has not yet arisen. That instance, however, will serve as an illustration of the extent to which only, as I conceive, the examination can be pressed. On this part of the motion I only add with respect to *Stevens v. Tillett*, supra, which Mr. Woods relied upon, that the Court distinguished between the case of the certificate of the Judges as to the status of the sitting member, which is final, and their report as to the petitioner or candidate, which is not. Therefore, although by their report they absolved the latter in respect of the recriminatory charges against him and set aside the election, that report did not prevent such charges from being again brought forward on a petition against his return at the succeeding election. The decision affords no ground for the conclusion—indeed is quite opposed to it—that on a subsequent election, like that now in question, evidence of corrupt acts by the same respondent at a previous election, can be given.

2nd. A question, No. 1719, was asked of the respondent: "Now, do you still refuse to say whether there was any discussion between you and Absalom Wilson with reference to his appointment to a public position prior to the present election?"

The respondent, on the advice of his counsel, refused to answer, and he was then asked: "And this refusal is with the knowledge that the question is asked on the ground that we assert that the matter was again discussed and renewed prior to the bye election?"

Counsel for the respondent: "Quite so."

"1721. And we expect to be able to prove that it was an inducement to Wilson to support Davis at the bye election?"

Counsel for the respondent: "Your statement is absurd;

because prior to the general election Mr. Davis could not have known that there was going to be a bye election.

Mr. Lennox: "It was renewed prior to the bye election."

The question was not answered.

In my opinion, it should have been.

The examination of the respondent was proceeded with at a great length, whether necessarily so or not I do not know, but if it is not continued with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.

The examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it. The respondent's counsel refused to consent to any enlargement or adjournment, and stated that if it was enlarged the respondent would not attend. The examiner said that if that was the case it was useless for him to fix a time, and enlarged the examination *sine die*. The course pursued is not that which the respondent should have taken, and, finding him to be in default as regards the above specified question, I must direct that he shall attend before the examiner at such time and place as he shall appoint in order that the examination shall be proceeded with.

It is perhaps needless to add that the view I have indicated as to the principal question argued does not in the least affect the right of the petitioner, if so advised, to take the opinion of the trial Judges unembarrassed by my decision, and to frame his particulars in the widest possible way in setting forth the charges of corrupt practices which he may deem open to him.

I make no order as to costs.

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[IN THE COURT OF APPEAL.]

REX V. CARLISLE.

*Constitutional Law—Ontario Liquor Act, 1902—Intra Vires—Voting on by Electors—Delegation of Legislative Power—Corrupt Practices—Appointment of Judge to Conduct Trial—Jurisdiction—Place of Trial—Jury—Conviction—Sentence—Imprisonment—Penalty—Costs—Form of Conviction—Habeas Corpus—Warrant of Commitment.*

The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws.

*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, and *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. 73, followed.

The Legislature, in enacting the Liquor Act, did not exceed, or fail to properly exercise, its powers.

Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them.

*Russell v. The Queen* (1882), 7 App. Cas. 829, *The Queen v. Burah* (1878), 3 App. Cas. 889, and *City of Fredericton v. The Queen* (1880), 3 S. C. R. 505, followed.

By sec. 91 (4), providing that the President of the High Court shall designate a county or district Judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under part I., the Legislature did not assume the power of appointing Judges, and did not exceed its powers in providing that a county or district Judge designated should exercise jurisdiction outside of his own county or district; and a Judge so designated may try the accused without a jury.

The provisions of sub-secs. (2) and (3) of sec. 91 are amplifications of the provisions of the Ontario Election Act which are incorporated in the Liquor Act; and the Judge in this case did not exceed his powers in sentencing the accused, whom he found guilty of impersonation, to one year's imprisonment in addition to the payment of a penalty of \$400 and costs.

The jurisdiction is to try at any place in Ontario, and it appearing in the order of conviction that the trial was held under the Act and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York at the city of Toronto, the order shewed jurisdiction, although it did not specify the place of trial.

It was immaterial that the order of conviction was intitled in the High Court of Justice, and that it did not shew the informer's name, the county Crown attorney of the county of York being shewn to be the prosecutor. Nor was it material that the date of the offence was not shewn, the time for conviction not having been limited by statute.

The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of \$400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid:—

*Held*, that upon habeas corpus proceedings within the year, the objections that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered; but the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year.

The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a taxing officer.

Order of BRITTON, J., affirmed; OSLER, J.A., dissenting.



AN appeal by the prisoner from an order of Britton, J., dismissing a motion for the prisoner's discharge upon the return of a writ of *habeas corpus*. The facts and arguments are stated in the judgment.

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The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 18th May, 1903.

*W. J. Tremear*, for the prisoner.

*J. R. Cartwright*, K.C., for the Crown.

July 7. MOSS, C.J.O.:—The prisoner was charged with the offence of personation in connection with the vote taken under the Liquor Act, 1902, on the 4th December, 1902. The act charged was the applying to a deputy returning officer, at a polling place in the city of Toronto, for a ballot paper in the name of a person other than himself.

He was summoned at the instance of the county Crown attorney for the county of York, and appeared before Neil McCrimmon, Esquire, the Judge of the county court of the county of Ontario, who had been designated by the President of the High Court of Justice, under sec. 91 of the Liquor Act, 1902, to conduct the trial of the prisoner and other persons accused of having committed offences in the city of Toronto. At the opening of the trial counsel for the prisoner objected that the learned Judge had not, either by virtue of the Liquor Act, or in consequence of any proceedings had thereunder, acquired jurisdiction to try and convict the prisoner. The objection being overruled, the trial proceeded, and the learned Judge, having heard the evidence, found and adjudged that the prisoner had committed and was guilty of the corrupt practice of personation. He thereupon ordered and adjudged that the prisoner pay to the county Crown attorney for the county of York the sum of \$400, the money penalty mentioned in sec. 167 (2) of the Ontario Election Act, and also the costs of the prosecution, which he directed to be taxed by one of the taxing officers of the High Court of Justice. He further directed that if the said sum of \$400, and the amount of the costs so to be taxed, were not paid within thirty days from the 19th February, 1903, the prisoner should be imprisoned in the common-gaol of

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the county of York for three months without hard labour, unless the said sum and costs were sooner paid. And he also adjudged that the prisoner for his said offence be imprisoned in the common gaol of the county of York without hard labour for the term of one year.

Under a warrant dated the 20th February, 1903, addressed to the sheriff of the county of York and others, and to the keeper of the common gaol of the county, and directing the commitment of the prisoner, he was taken to and is now confined in the county gaol. The warrant recites that the time appointed by the order of the learned Judge for the payment of the said several sums of money had elapsed, and that the prisoner had not paid the same or any part thereof, but had made default. This is a manifestly erroneous statement, for the thirty days for payment only commenced to run from the 19th February, and the amount of the costs had not even been ascertained or settled by taxation or otherwise.

The application for the prisoner's discharge is based on numerous exceptions to the proceedings. Included in them are objections to the validity of the Liquor Act, 1902, and in consequence thereof we directed notice of the argument to be given to the Attorney-General for the Dominion, who intimated that he did not desire to be heard.

The exceptions taken to the validity of the Act may be shortly stated as follows :—

(1) The coming into effect of any part of the Act is made dependent upon the result of the vote directed to be taken.

(2) In any event the coming into force of the second part of the Act is made dependent upon the result of the vote, and in both or either of these cases there has been an improper delegation by the Legislature of its power of enacting laws to a body incapable of exercising the functions of proclaiming a law on its behalf; and, finally, the Legislature does not possess the power assumed to be exercised in sec. 91 of the Act of 1902 of appointing a tribunal to exercise the jurisdiction of a Court or of delegating to the President of the High Court the power to designate such a tribunal.

The Act received the assent of the Lieutenant-Governor on the 17th March, 1902. That the subject matter is one with

regard to which the Legislature is competent to enact a law or laws must be taken to be definitely settled by the judgments of the Judicial Committee in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, and *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. 73. The question is, did the Legislature in enacting the Act in its present form exceed or fail to properly exercise its powers?

The Act is in two parts. In part I. it is enacted that "there shall be submitted to the vote of the electors hereinafter declared entitled to vote thereon the following question: Are you in favour of bringing into force the Liquor Act, 1902?" (2) The voting shall take place upon the said question in all the electoral districts in this Province on the 4th day of December in the year 1902, being the first Thursday in said month."

Then follow elaborate provisions concerning the qualification of voters, the appointment of returning officers, the opening and holding of the polls and the taking of the vote, the preservation of peace, the maintenance of secrecy, the prevention of corrupt practices, the return of results, and the final summing up of the votes. Then it is enacted (sec. 104) that in case it appears from the summary that a majority of the votes on the said question are in the affirmative, and that the number of votes on the question in the affirmative exceeds one-half of the number of votes to be ascertained as specified, the Lieutenant-Governor shall issue his proclamation declaring part II. of the Act to be in force on, from, and after the 1st day of May, 1904, and part II. shall come into force and take effect on, from, and after the said date accordingly.

Now, while the effect of these provisions is that until the issue of a proclamation by the Lieutenant-Governor, which he can only issue upon the happening of a certain event, the coming into force and taking effect of part II. is suspended, there is nothing in them or in any other provision of the Act that we can discover to suspend the operation of the rest of the Act or to render its coming into force conditional upon any future Act or event. Except as provided in sec. 104, there is no later date for the commencement of the Act or any part of it, and as regards part I. the provision of the Interpretation Act, sec. 6

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(2), that the date of the assent shall be the date of the commencement, governs. All the provisions of part I. have, therefore, been in force since the 17th March, 1902, and as regards it the aid of a vote of the electors or the issue of a proclamation was not required to bring it into force. All the provisions for the submission of the question and the ascertainment of the result of the voting, upon which depended the question whether the other part of the Act should come into force, became operative upon assent to the Act. The assent given applies to every part of the Act, but the taking effect of a part is made conditional upon the happening of some subsequent event.

Legislation which provides a law but leaves the time and manner of its taking effect to be determined by the vote of the electors is not a delegation of legislative power to them. The subject matter being, as before pointed out, within the competence of the Legislature, it has provided the whole legislation, and what remains partakes in no sense of the nature of legislation. It is only necessary to quote the language of Sir Montague E. Smith, in delivering the opinion of the Judicial Committee in *Russell v. The Queen* (1882), 7 App. Cas. 829. He says (p. 835): "The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. . . . Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of *The Queen v. Burah*, lately before this Board."

There is no substantial distinction between *Russell v. The Queen* and *The Queen v. Burah* and the present. By the legislation which was under discussion in *The Queen v. Burah* (1878), 3 App. Cas. 889, much larger powers were left to be exercised by the Governor and much wider



discretion was vested in him than are here conferred upon the electors. But their Lordships rejected the argument that there was a delegation of legislative functions, observing (p. 906) that "where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, intrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient."

In *City of Fredericton v. The Queen* (1880), 3 S.C.R. 505, Ritchie, C.J. of Canada (to whose opinion reference is made by Sir Montague E. Smith in *Russell v. The Queen*), adopts (p. 530) the statement in Cooley on Limitations, 4th ed., p. 142, that "it is not always essential that a legislative act should be a completed statute, which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event." This statement of the doctrine covers the present case.

There remains the objection that the Legislature has exceeded its powers in enacting sec. 91 of the Act.

This section is directed to the prevention and punishment of corrupt practices during the taking of the vote, and makes provision for the trial and punishment of offenders; and as, besides the question of *ultra vires*, other questions are raised with regard to its construction, operation, and effect, it is proper to quote at length the portions on which the questions turn:

By sub-sec. (1) it is declared that all the provisions of the Ontario Election Act and amendments thereto relating to the prevention and punishment of corrupt practices and other illegal acts at elections and contained in secs. 159 to 170 inclusive, and in secs. 181 to 186 inclusive, and in secs. 190 to 196 inclusive, of the said Act and amendments thereto, shall *mutatis mutandis* apply to the taking of the vote.

Sub-section (2) provides that the penalties imposed for a contravention of any of the provisions mentioned in the pre-

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ceding sub-section and thereby incorporated in this part, or for a contravention of any other provision in this part, shall be recovered in the same manner as penalties for the like offences are recoverable under the Ontario Election Act, and the procedure therein shall be the same as nearly as may be as they (*sic*) would have been had the offence been committed at the election of a member to serve in the Legislative Assembly.

Sub-section (3): It shall be the duty of every county Crown attorney and of every district Crown attorney, upon receiving information that any offence has been committed under this Act, to take proceedings for the prosecution of the offender and the recovery of penalties by this Act imposed.

Sub-section (4): In case a county or district Crown attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connexion with the voting under this part, he shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a county or district court of a county or district other than that in which such offence was committed, to conduct the trial of the persons accused, and the procedure thereon shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto.

It is upon this last sub-section that the objection now under consideration chiefly turns. It is argued that the Legislature has therein assumed the power of the appointment of Judges. But there is no appointment of any person to the judicial office. There is not even the creation of a judicial office to which any person not holding the position of Judge of a county or district court could be appointed.

Section 188 of the Ontario Election Act, which is incorporated in the Liquor Act, 1902, and made to apply *mutatis mutandis* to proceedings under it, provides a mode of trial of persons accused of offences thereunder, by the Judges or a Judge upon the rota or by any Judge of the High Court holding a sittings of the Court for the trial of civil or criminal causes. Instead of putting the trials of offenders under the Liquor Act, 1902, upon these Judges, sec. 91 imposes the duty

upon persons holding the office of Judge of county or district courts.

The Judge to be designated may not try cases arising in his own county or district. But there is nothing in the Act saying that he shall not conduct in his own county or district the trial of the cases for which he is designated.

Sub-section (2) of sec. 188 provides that the summons may be issued or returnable at any place in this Province, and so far as appears there is no reason why a summons against a person who committed an offence under the Liquor Act, 1902, in one county or district, might not be made returnable in another county or district. In the same way the Judge by whom the summons is issued may exercise jurisdiction at the place where the summons is returnable. The Legislature, having the power to make laws regarding the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts both of civil and criminal jurisdiction, has deemed it proper to create a special tribunal for the trial of offences under the Liquor Act. The Judges exercise jurisdiction under this statutory commission, acting just as the Election Judges act, outside of and distinct from the jurisdiction they exercise in their respective courts. And the Legislature did not exceed its powers when, by sec. 91, it provided for the substitution of county or district Judges to conduct the trials of offenders under the Act and enabled them to exercise jurisdiction outside of their county or district.

The remark of Hagarty, C.J., in *Re Wilson v. McGuire* (1883), 2 O.R. 118, is in point. He says (p. 124): "It was urged that he" (the county Judge of Lambton) "could not perform judicial duties beyond its limits. It is sufficient here to say that he has in fact performed them under the authority of the Provincial Legislature, and that the latter, having complete power over the division courts, have designated him, amongst other named functionaries, to preside in the Court, and that he so presided."

The manner of designation, *i.e.*, by the President of the High Court, is on the whole convenient and involves no delegation of appointment to office, any more than would the giv-

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ing power of assigning to the Judges of the High Court their circuits or sittings in Court.

It was objected that, assuming the Judge to be well appointed, he had no power to deprive the prisoner of his right of trial by jury. But a person charged with having committed a corrupt practice or illegal act under the provisions of the Ontario Election Act cannot demand a jury as of right. By sub-sec. (4) of sec. 188, upon the return of the summons the Judge is required to investigate and dispose of the case in a summary manner, and he is given wide powers of adjournment from time to time and from place to place, altogether inconsistent with the notion of a trial by jury. It is true that sub-sec. (2) of sec. 169 provides for punishment in case of trial by jury, but this is in cases where the Election Court orders the person charged to be prosecuted before some other Court. These provisions do not seem to apply to trials under sec. 188.

It is also objected that the order of conviction is bad on a number of grounds. The most important is that the Judge has sentenced the prisoner to one year's imprisonment in addition to the payment of a penalty of \$400 and costs, whereas, under sec. 91, the Judge's jurisdiction is limited to the imposition of the pecuniary penalty. It is argued that sub-secs. (2) and (3) of sec. 91 only provide for the punishment of persons accused by the infliction of a pecuniary penalty and not by imprisonment, and that the jurisdiction of the Judges appointed and designated under sub-sec. (4) is confined to the conduct of the trial for the recovery of the pecuniary penalty. But a reference to some of the provisions of the Ontario Election Act which are incorporated in the Liquor Act will shew that the provisions of sub-secs. (2) and (3) of sec. 91, so far from being restrictions upon are amplifications of them. By sec. 167, a person found guilty of personation as therein defined shall incur a penalty of \$400, and shall also on conviction be imprisoned for a term of one year with or without hard labour. The punishment being thus prescribed, the procedure is found in sec. 188. By sub-sec. (7) the Judge, being satisfied that the person charged has committed the offence, shall adjudge that the said person has committed the corrupt practice or illegal act and shall order him to pay to the person at whose instance



the summons was issued the amount of the money penalty. Sub-section (2) of sec. 91 of the Liquor Act refers to the money penalties here spoken of, when it provides that the penalties shall be recovered in the same manner as penalties for the like offence are recoverable under the Ontario Election Act. Provision is made for such recovery by sub-secs. (11), (13), (14), and (16) of sec. 188, and by secs. 195 and 196. Sub-section (10) of sec. 188 provides that if any punishment in addition to or instead of a money penalty is by law assigned to the commission of any offence of which such person has been found guilty, the Judges shall sentence the person so found guilty to undergo such punishment and shall give all necessary directions in respect thereto. The punishment of imprisonment is thus made to follow upon the adjudication of guilt, and is brought into play by the direction in sub-sec. (4) of sec. 91 of the Liquor Act, that the procedure on the trial shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act.

Therefore, while sub-sec. (2) deals with the recovery of the money penalties, sub-sec. (4) covers the case of punishment by imprisonment and confers the jurisdiction to award it. And sub-sec. (3) makes it the duty of the county Crown attorneys and district Crown attorneys to become the prosecutors and to take proceedings for the prosecution of the offender involving the punishment by imprisonment, and also for the recovery of the money penalties by one or other of the modes prescribed for the recovery of such penalties.

The objection that the order of conviction does not shew on its face where the trial was held, and therefore does not shew jurisdiction, is disposed of by what has already been said as to the jurisdiction. The jurisdiction is to try at any place in Ontario, and it appears that the trial was held under the Act. The order shews that the offence was committed at the city of Toronto, and the prisoner is sentenced to be imprisoned in the common gaol of the county of York at the city of Toronto.

The fact that the order is intituled in the High Court of Justice is immaterial, and that objection fails. The objection that it does not shew the name of the informer also fails. The county Crown attorney of the county of York is clearly shewn

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to be the prosecutor. So as to the date; the trial proceeded on the day the order bears date, and a date seems to be material only when the time for conviction is limited by statute, and it is necessary that the date of the conviction should bring it within that time when compared with the date alleged for the offence: Paley, 7th ed., p. 230.

The objection to the form of the detainer has no force.

The next objection is that while the prisoner is ordered to pay the costs they are not ascertained or fixed or stated in the order.

But this question does not arise at the present time. The prisoner is in custody under an order for his imprisonment for one year. In addition to this he is ordered to pay a penalty of \$400 and costs within thirty days, and in default to be imprisoned for three months unless sooner paid. But in an order such as this is, the part relating to payment of the costs is readily separable from the other part, and the order stands good as regards the imprisonment for one year. As remarked by Street, J., in *Rex v. Foster* (1903), 5 O.L.R. 624, 628, there is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. At the expiration of that period, the question of the prisoner's further detention will arise, and it may then prove difficult for the Crown to shew any warrant for it.

No authority has been shewn to justify the reference to one of the taxing officers to tax or ascertain the amount of the costs. The ordinary rule is that the convicting justice should fix and insert the amount in the order, and the direction in subsec. (15) of sec. 188 of the Ontario Election Act that the costs shall be included with the penalty in the same order points to that being the proper practice in this case.

This also disposes for the present of the objection that the warrant of commitment erroneously states that the time for payment of the penalty and costs had expired.

These are the objections appearing to have any substance, and they fail to support the application for the prisoner's release. The appeal must be dismissed and the prisoner remanded to custody. But the order to be drawn up will

reserve to the prisoner the right to apply again for his discharge at the expiration of the year's imprisonment.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I am unable to concur in affirming this conviction, but, as the case can go no further, deem it unnecessary to enter at large into a consideration of the numerous objections which have been taken to its validity. Of one of them, however, which goes to the root of the matter, I may briefly say that it appears to me that upon the true construction of sec. 91 of the Liquor Act of 1902, the jurisdiction of the person exercising the powers said to have been conferred upon him by the novel and extraordinary method provided by that section for the prosecution of corrupt practices at the vote taken under the 1st part of the Act, extends only to the imposition of the money penalty mentioned in the amended 188th section of the Election Act, and not to the infliction of the penalty or punishment of imprisonment mentioned in that section. The term "penalty" is usually applied to pecuniary punishment, though in its strict and primary sense it no doubt denotes "a punishment, corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws:" Am. and Eng. Encyc. of Law, 2nd ed., vol. 22, p. 654; *The Queen v. The Justices of Middlesex* (1882), 9 Q.B.D. 41; *The State v. Hardman* (1896), 16 Indiana App. 357.

Nevertheless, its meaning in any given case is to be ascertained from the context, and where that, as in the present case, speaks only of "the recovery" of penalties, and of penalties being "recoverable," it is, to my mind, a plain indication that pecuniary penalties are intended, these terms being quite inappropriate to authorize the infliction of the penalty or punishment of imprisonment, and inapt to confer jurisdiction to impose it. Had sec. 91 enacted that persons contravening the provisions of the Act should be *liable* to the penalties mentioned in the Election Act, there would have been little room for argument that the corporal as well as the pecuniary penalties were enforceable: *United States v. Ulrici* (1875), 3 Dillon's Cir. Ct. Rep. 532: but the frame of the enactment is very different from this, and the consequences to the person being so momentous, we ought not to extend the plain meaning of the

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words used, even though we may think that the draftsman had something else in view.

If half the penalty "recovered" had been given to the informer, it is probable that we should not have found him arguing so earnestly that imprisonment was included and intended to be imposed under these words.

That part of the judgment which directs the costs of the prosecution to be taxed by one of the taxing officers of the High Court is clearly bad.

If the Judge had any power to award costs, he should have ascertained the amount and named it in the judgment. He had no power to delegate this duty to any one else; and the judgment as to costs, and adjudication of imprisonment for a further period of three months in the event of non-payment, are on this ground equally invalid: *Freeman v. Read* (1860), 9 C.B.N.S. 301; *The Queen v. Long* (1841), 1 Q.B. 740; *Sellwood v. Mount* (1841), 1 Q.B. 726; Burn's Justice, 30th ed. (1869), Appeal VII., p. 257.

So far as the judgment purports to impose imprisonment for non-payment of the penalty of \$400, it is also void, this not being authorized by sec. 167 (2) of the Ontario Election Act. These objections, however—the adjudication of the substantive penalty of imprisonment being upheld—are of no avail to the applicant at the present time, though he will of course be at liberty to apply for another writ of habeas corpus should it be attempted to detain him under the judgment and warrant for more than a year.

For the reasons above given, I am of opinion that he is now entitled to his discharge, but the other members of the Court being of a different opinion, he must be remanded.

T. T. R.



## APPENDIX.

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List of cases reported in the Ontario Law Reports decided by the Judicial Committee of the Privy Council and the Supreme Court of Canada from 1st July, 1903, to 1st January, 1904.

GRAND HOTEL COMPANY OF CALEDONIA SPRINGS v. WILSON, 2 O.L.R. 322.—Appeal dismissed, [1904] A.C. 103.

GRAVES v. GORRIE, 1 O.L.R. 309, 3 O.L.R. 697.—Appeal dismissed, [1903] A.C. 496.

BLAIN v. CANADIAN PACIFIC RAILWAY COMPANY, 5 O.L.R. 334.—Varied, 34 S.C.R. 74.

GRAND TRUNK RAILWAY CO. v. MCKAY, 5 O.L.R. 313.—Reversed, 34 S.C.R. 81.



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## APPEAL.

*Interlocutory Order—Varying Minutes—Con. Rule 625, sub-sec. 2—County Judge Certifying Papers.*—An order made by a county court Judge dismissing an application to vary minutes under Con. Rule 625, sub-sec. 2, is an interlocutory and not a final order.

But:—The fact that there may be no appeal from such an order is no reason why the Judge should not certify the papers; the question whether or not there is an appeal from such an order is for the Court appealed to and such certificate should as a rule be given upon request; the Judge's duty being ministerial only. *Re Taggart v. Bennett*, 74.

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### ASSESSMENT AND TAXES.

1. *Street Railway Companies—Electric Light Companies—“Rolling Stock, Plant and Appliances”—Construction of Statute—Ejusdem generis—2 Edw. VII. ch. 31, sec. 1 (O.)—R.S.O. 1897, ch. 224, sec. 18.*—The statute 2 Edw. VII. ch. 31, sec. 1, amending sec. 18 of the Assessment Act, R.S.O. 1897, ch. 224, provides by sub-sec. 3 for the assessment as “land” of “the rails, ties, poles, wires, gas and other pipes, mains, conduits, sub-structures and superstructures” of companies of the kind referred to in the section,—“upon the streets, roads, highways, lanes and other public places of the municipality,”—and by sub-sec. 4, that “save as aforesaid, rolling stock, plant and appliances of such companies “shall not be ‘land’ within the meaning of the

Assessment Act, and shall not be assessable”:—

*Held*, that upon the proper construction, this means that the rolling stock, rolling plant, and rolling appliances of such companies, which is found and used on the streets, etc., shall not by reason merely of the wide words “substructures and superstructures” in sub-sec. 3, be liable to assessment as “land” save as mentioned in sub-sec. 3.

There is no intention to exempt the companies in question from assessment in respect of such of their plant and appliances, as is otherwise “land” within sub-sec. 9 of sec. 2 of the Assessment Act, but is not on the streets, etc.

*Held*, also, that the lamps, hangers, and transformers of an electric light company, though easily transferable from one place to another, were “superstructures” upon the street within the meaning of sub-sec. 3. *Toronto Railway Co. v. City of Toronto. Toronto Electric Light Co. v. City of Toronto. Incandescent Light Co. of Toronto, Limited v. City of Toronto. Ottawa Electric Co. v. City of Ottawa. Ottawa Gas Co. v. City of Ottawa*, 187.

2. *Statute Labour—Separate Assessment of Distinct Lots—Assessment Act, sec. 109.*—Section 109 of the Assessment Act, which in effect provides that if the assessment is for more than 200 acres “the statute labour shall be rated and charged against every separate lot or par-



cel according to its assessed value," is imperative, and not merely directory.

Where, therefore, on an assessment of 600 acres instead of the amount chargeable against the several lots owned by the plaintiff being rated and charged against each of such lots, a bulk sum was assessed for statute labour and charged against the whole of them, such assessment was held invalid. *Love v. Webster* (1895), 26 O.R. 453, followed. *Waechter v. Pinkerton et al*, 241.

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### ASSIGNEE.

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### BANKRUPTCY AND INSOLVENCY.

*Assignments and Preferences Act — Motion to Remove Assignee for Benefit of Creditors — Notice of Motion — Grounds.—Evidence—Proposed*

*Examination of Assignee — Judicature Act and Rules.*]

Where a summary motion is made under sec. 8 (1) of the Assignments and Preferences Act, R.S.O. 1897, ch. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application.

The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it. *Re Wilson*, 564.

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*Promissory Note — Illegal Consideration — Contract in Restraint of Marriage—Insanity.*]—The only consideration

for the making of a promissory note for \$1,500 by the defendant's intestate in favour of the plaintiff was an agreement on the plaintiff's part not to marry L. or any other man as long as the intestate should live. She was about 30 years old, and was his cook and housekeeper; he was about 60 years of age, and apparently in excellent health; but three months after he made the note he became insane, and died a year later:—

*Held*, that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note was therefore an illegal one, and no recovery could be had upon it.

On the evidence, the issue raised as to the capacity of the deceased at the time the note was made was found in favour of the plaintiff. *Crowder v. Sullivan*, 708.

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*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, followed.]—See CONSTITUTIONAL LAW, 3.

*Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. 73, followed.]—See CONSTITUTIONAL LAW, 3.

*Bourque v. City of Ottawa*, 6 O. L. R. 287, considered.]—*See* CHOSE IN ACTION, 4.

*Bowden, Re, Andrew v. Cooper* (1890), 45 Ch. D. 444, commented on and followed.]—*See* TRUSTS AND TRUSTEES, 3.

*Bowman v. Blyth* (1856), 7 E. & B. 26, applied and followed.]—*See* JUSTICE OF THE PEACE.

*Cameron, Re* (1901), 2 O.L.R. 756, followed.]—*See* TRUSTS AND TRUSTEES, 4.

*Centaur Cycle Co. v. Hill* (No. 2) (1902), 4 O.L.R. 493, followed.]—*See* COSTS, 5.

*City of Fredericton v. The Queen* (1880), 3 S.C.R. 505, followed.—*See* CONSTITUTIONAL LAW, 3.

*Coggs v. Bernard* (1703), 2 Ld. Raym. 909, specially considered.]—*See* PRINCIPAL AND AGENT.

*Collins v. North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228, followed.]—*See* PRACTICE, 4.

*Duke of Buccleugh*, [1892] P. D. 201, specially referred to.]—*See* PLEADING, 2.

*Earle v. Kingscote*, [1900] 2 Ch. 585, applied and followed.]—*See* HUSBAND AND WIFE.

*Exchange Bank Co., Re Flitcroft's Case* (1882), 21 Ch. D. 519, followed.]—*See* INTEREST, 1.

*Ford v. Hodgson* (1902), 3 O. L. R. 526, followed.]—*See* INDIAN LANDS.

*Galt v. Erie R. W. Co.* (1868), 14 Gr. 499, distinguished.]—*See* RAILWAYS, 1.

*Gillatley v. White* (1870), 18 Gr. 1, considered.]—*See* VENDOR AND PURCHASER, 2.

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*Greville v. Brown* (1859), 7 H. L. C. 689, distinguished.]—*See* WILL, 8.

*Harrison v. Armour* (1865), 11 Gr. 303, followed.]—*See* INDIAN LANDS.

*Hess Manufacturing Co., Re* (1894), 23 S. C. R. 644, explained.]—*See* COMPANY, 3.

*Hughes v. Chambers* (1902), 22 C. L. T. 333, approved.]—*See* CHOSE IN ACTION, 2.

*Independent Order of Foresters v. Pegg* (1899-1900), 19 P. R. 80, distinguished.]—*See* DISTRICT COURTS.

*Jacobs v. Booth Distillery Co.* (1901), 85 L.T.N.S. 262, followed.]—*See* JUDGMENT, 2.

*Jones v. Bissonnette* (1902), 3 O. L. R. 54, considered.]—*See* PRACTICE, 4.

*Kingston v. Salvation Army*, 5 O. L. R. 585, considered, and not followed.]—*See* PARTIES, 2.

*Laishley v. Goold Bicycle Co.*, 4 O. L. R. 350, reversed.]—*See* DAMAGES.

*Lee v. Hopkins* (1890), 20 O.R. 666, approved of.]—*See* HUSBAND AND WIFE.

*Le Mesurier v. Le Mesurier*, [1895] A. C. 517, followed.]—*See* CRIMINAL LAW, 2.

*Livingstone v. Sibbald* (1893), 15 P. R. 315, considered.]—*See* PRACTICE, 4.

*Lopez v. Chavarri* (1901), W. N. 115, distinguished.]—*See* PRACTICE, 7.

*Love v. Webster* (1895), 26 O. R. 453, followed.]—*See* ASSESSMENT AND TAXES, 2.

*Magurn v. Magurn* (1883-5), 3 O. R. 570, 11 A. R. 178, followed.]—*See* CRIMINAL LAW, 2.

*Midland R. W. Co. v. Young* (1903), 22 S. C. R. 190, followed.]—*See* SCHOOLS, 2.

*Mustapha Re, Mustapha v. Wedlake* (1891), 8 Times L. R. 160, followed.]—*See* GIFT, 1.

*McKay v. Colonial Investment & Loan Co.* (1902), 4 O. L. R. 571, considered.—*See* PRACTICE, 4.

*Peto v. Welland R. W. Co.* (1862), 9 Gr. 455, distinguished.]—*See* RAILWAYS, 1.

*Phillips v. Edwards* (1864), 33 Beav. 440, considered.]—*See* VENDOR AND PURCHASER, 2.

*Regina v. Burah* (1878), 3 App. Cas. 889, followed.]—*See* CONSTITUTIONAL LAW, 3.

*Russell v. The Queen* (1882), 7 App. Cas. 829, followed.]—*See* CONSTITUTIONAL LAW, 3.

*Sanderson v. Burdett* (1869), 16 Gr. 119, followed.]—*See* VENDOR AND PURCHASER, 1.

*Skilling v. Royal Insurance Co.* (1902), 4 O. L. R. 123, affirmed.]—*See* INSURANCE, 3.

*Smith v. Fort William Public School Board* (1893), 24 O. R. 366, commented on.]—*See* SCHOOLS, 2.

*Southwold School Sections, Re* (1902), 3 O. L. R. 81, applied.]—*See* SCHOOLS, 1.

*Summers v. Cooke* (1880), 28 Gr. 179, followed.]—*See* INDIAN LANDS.

*Thomas, Re* (1901), 2 O. L. R. 660, followed.]—*See* WILL, 7.

*Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107, followed.]—*See* TRUSTS AND TRUSTEES, 4.

*Widder v. Buffalo and Lake Huron R. W. Co.* (1865), 24 U. C. R. 222, applied and followed.]—*See* COSTS, 4.

*Young v. Dominion Construction Co.* (1900), 19 P. R. 139 referred to.]—*See* PRACTICE, 1.

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## CHOSE IN ACTION.

1. *Assignment of—Notice to Debtor—Judicature Act—Sufficiency of Notice—R.S.O. 1897, ch. 51, sec. 58, sub-sec. 5.*—A creditor of the defendants to whom they owed \$184.93, being \$124.80 for oak lumber, and \$60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice, however, which the defendants had of this assignment was in a letter from the plaintiff stating that he had an order from the creditor for the amount due in respect to a purchase of "oak lumber" bought by the defendants' agent. The plaintiffs drew on the defendants for the whole amount, who refused to accept the draft on the ground that they had no order from their vendor to do so. Thereupon the present action was brought:

*Held*, that though there was sufficient to put the defendants upon enquiry in the notice they received, yet it was not sufficiently clear and express to entitle the plaintiff to sue in his own name without making the assignor a party, under the section of the Judicature Act relating to assignments of choses in action. *McMillan v. Orillia Export Lumber Co.*, 126.

2. *Equitable Assignment—Form of.*] No writing or any particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest being all that is required. *Hughes v. Chambers* (1902),

22 C.L.T. 333 approved. A client, who was indebted to a solicitor for costs incurred, informed him that, on the receipt by him of certain moneys, which he was instructed to collect for the client, he was to pay certain obligations, including his own bill of costs:—

*Held*, that this constituted a good equitable assignment. *Re McRae Estate*, 238.

3. *Assignment of Money Payable in respect of Contract—Damages for Interference with the Work—Attachment of Debts.*] A contractor for the construction of a drain assigned to a bank as security for advances "all and every sum or sums of money now due to or become due and payable to me by (the employer) in respect of a certain contract existing between myself and the said (employer) for the construction of section three of the drain," describing it. The cost of doing the work was increased owing to the employer negligently allowing water to flow into the drain, and the contractor obtained a judgment against the employer for damages for the negligence:

*Held*, that the amount payable under this judgment passed to the bank as money payable in respect of the contract and was not attachable by a judgment creditor of the contractor. *Graham v. Bourque*, 428.

4. *Assignment of Money Payable "in Respect of the Con-*

tract"—*Damages for Interference with the Work—Attachment of Debt.*]—*Held*, affirming the decision of Street, J., *ante* 428, that the assignment to the claimants of moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded to the contractor by the judgment in *Bourque v. City of Ottawa*, *ante* 287, and therefore these moneys were not attachable by a judgment creditor of the contractor. *Graham v. Bourque*, 700.

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### COMPANY.

1. *Winding-up—Final Order—Appealable Order—Order Dissolving Company—Order Rescinding—R.S.O. 1897, ch. 222, secs. 27-41—Consolidated Rule 358—Ontario Joint Stock Companies Winding-up Act.*]—On March 24th, 1902, a county court Judge made an order, upon an affidavit of a liquidator, declaring the above association dissolved. On June 21st, 1902, on the application of a dissatisfied shareholder, he made an order revoking his former order, and also one which he had made

on April 7th, 1902, staying proceedings in actions against the association.

*Held*, that the order of June 21st was an appealable order, for even if the appeal to the Court of Appeal under section 27 of the Winding-up Act was to be restricted to appeals from final orders, yet this was a final order since it put an end to the order of dissolution.

*Held*, however (MACLENNAN, J.A., *dissentiente*, on the ground that the county court Judge had been misled when making the order), that the county court Judge had no authority to make the order of June 21st, as he had no further material before him than he had had when making that of March 24th, and there was no reason for saying that he had been misled in making the former order, and the proper way to have attacked the latter order was by appeal. *Re Equitable Savings Loan and Building Association*, 26.

2. *Dominion Winding-up Act—Staying Proceedings in another Province—Staying Execution—Setting aside Sale—Summary Proceedings—R.S.C. 1886, ch. 129, s. 13.*]—There is jurisdiction under sec. 13 of the Dominion Winding-up Act, R.S.C. 1886, ch. 129, to restrain proceedings against the company, even in actions outside the ordinary territorial jurisdiction of the Court, and the enforcing of an execution is a proceeding within this section:

*Held*, therefore, that there was jurisdiction in the High Court in this Province to make an order staying proceedings under an execution in the hands of the sheriff of a county in the Province of New Brunswick, as had been done in this case. But the sheriff having, notwithstanding, proceeded with the sale under the execution against the lands of the company, and executed a deed of the same to the purchaser :

*Held*, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void. *Re Tobique Gypsum Co., Costigan v. Langley*, 515.

3. *Winding-up—Action for Calls—Counterclaim for Rescission—Leave to Proceed Refused—Leave to Appeal.*]—Previous to an order for the winding-up of the company under the Dominion Winding-up Act an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus :

*Held*, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim ; and his application for leave to proceed in the action notwithstanding the winding-up order, was refused, but

leave to apply again was reserved.

Dictum of Strong, C. J., in *Re Hess Manufacturing Co.* (1894), 23 S.C.R. 644, at pp. 665-6, explained.

Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed, was refused. *Re Pakenham Pork Packing Co.*, 582.

*Telephone.*]—See CONSTITUTIONAL LAW, 2.

*Examination of Officer.*]—See EVIDENCE, 2.

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## CONSTITUTIONAL LAW.

1. *Statutes--Dominion Legislation--Preamble--“Work for the General Advantage of Canada”--Public Property--Expropriation of Private Land.*]—The preamble to an Act of the Dominion Parliament recited, that it was desirable for “the general advantage of Canada” that a company should be formed for the purpose of utilizing the waters of certain navigable rivers in the Province of Ontario, with the object of promoting manufacturing industries and inducing the establishment of manufacturing and other businesses in Canada ; and the Act then expressly authorized



the construction of certain works connected therewith and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada ; and also authorized the company to enter into certain contracts extending beyond the limits of the Province, which Act was subsequently amended by the Dominion Parliament and recognized by the Legislature of Ontario:—

*Held*, that the preamble shewed by implication the intention of Parliament to give the power to deal with public property of the Dominion and to expropriate private property in the Province, and the reason for doing so ; and was a Parliamentary declaration that the formation of the company for the purposes mentioned was for “the general advantage of Canada.”

*Re Ontario Power Company of Niagara Falls and Hewson*, 11.

2. *Telephone Company--Work or Undertaking Connecting Provinces--Jurisdiction of Dominion Parliament--B.N.A. Act, sec. 91 (29) sec. 92 (10a)--Right to Construct Lines in Streets--Effect of Provincial Act.*]—The work or undertaking for the prosecution of which the defendants were incorporated by 43 Vict. ch. 67 (D.) is one falling within the description of a work or undertaking connecting the Province with any other of the Provinces, or extending beyond the limits of the Province, within the meaning of the exception *a.* in clause 10 of sec. 92 of the

British North America Act, and therefore falls within the exclusive legislative authority of the Parliament of Canada, under clause 29 of sec. 91.

The powers conferred by the defendants' Act of incorporation, as amended by 45 Vict. ch. 95 (D.), are not curtailed by the provisions of 45 Vict. ch. 71 (O.), as regards the right to construct, erect, and maintain their line or lines of telephone along the sides of and across or under any highway or street of the city of Toronto, subject, however, to the provisos set forth and contained in sec. 3 of the Act of incorporation as amended ; *MACLENNAN, J.A.*, dissenting.

Judgment of Street, J., 3 O.L.R. 465, reversed. *City of Toronto v. Bell Telephone Co. of Canada*, 335.

3. *Ontario Liquor Act, 1902—Intra Vires—Voting on by Electors—Delegation of Legislative Power--Corrupt Practices—Appointment of Judge to Conduct Trial—Jurisdiction—Place of Trial—Jury—Conviction—Sentence—Imprisonment—Penalty—Costs—Form of conviction—Habeas Corpus—Warrant of Commitment.*]—The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws.

*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, and *Attorney-General of Manitoba v. Manitoba License Hold-*



ers' Association, [1902] A.C. 73, followed.

The Legislature, in enacting the Liquor Act, did not exceed, or fail to properly exercise, its powers.

Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them.

*Russell v. The Queen* (1882), 7 App. Cas. 829, *The Queen v. Burah* (1878), 3 App. Cas. 889, and *City of Fredericton v. The Queen* (1880), 3 S.C.R. 505 followed.

By sec. 91 (4), providing that the President of the High Court shall designate a county or district Judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under part I., the Legislature did not assume the power of appointing Judges, and did not exceed its powers in providing that a county or district Judge designated should exercise jurisdiction outside of its own county or district; and a Judge so designated may try the accused without a jury.

The provisions of sub-sec. (2) and (3) of sec. 91 are amplifications of the provisions of the Ontario Election Act which are incorporated in the Liquor Act; and the Judge in this case did not exceed his powers in sentencing the accused, whom he found guilty of impersonation, to one year's imprisonment in addition to the payment of a penalty of \$400 and costs.

The jurisdiction is to try at any place in Ontario, and it appearing in the order of conviction that the trial was held under the Act and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York at the city of Toronto, the order shewed jurisdiction, although it did not specify the place of trial.

It was immaterial that the order of conviction was intitled in the High Court of Justice, and that it did not shew the informer's name, the county Crown attorney of the county of York being shewn to be the prosecutor. Nor was it material that the date of the offence was not shewn, the time for conviction not having been limited by statute.

The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of \$400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid:—

*Held*, that upon habeas corpus proceedings within the year, the objections that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered; but the right should be reserved to the prisoner to

apply again for his discharge at the expiration of the year.

The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a taxing officer.

Order of Britton, J., affirmed; OSLER, J.A., dissenting. *Rex v. Carlisle*, 718.

### CONSIDERATION.

*Illegal.*]—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

### CONTRACT.

1. *Company—Medical Attendance for Men*—"Hospital Fund"—*Implied Obligation.*]—A fund called "The Hospital Fund" was formed by a mining company from contributions deducted from the wages of the employees, for the purpose of providing medicine and medical attendance for those of the men who required it, physicians being attached to the works of the company whose duty it was to attend the men and provide the necessary medicines:—

*Held*, that no obligation was imposed on the company towards another physician employed by the men to pay for his services out of this fund. *Struthers v. Canadian Copper Co.* 374.

2. *Services by Near Relations*—*Implied Right to Remuneration—Presumption.*]—The presumption against an implied

right to remuneration for services rendered by near relations arises only when the persons rendering the services, and those to whom they are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may, in the case of near relations, be negatived on very slight grounds.

The Court held, on the facts in this case, that the plaintiff, a married woman who left her home to nurse her sister, was not entitled to remuneration for her services.

Judgment of Meredith, C.J., C.P., affirmed. *Mooney v. Grout*, 521.

*Joint.*]—See **EXECUTORS AND ADMINISTRATORS**, 2.

*Privity of.*]—See **NEGLIGENCE**, 3.

*Oral.*]—See **VENDOR AND PURCHASER**, 2.

See **INTEREST**, 2—SHIP.

### CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE**, 3.

### CONVICTION.

*Form of.*]—See **CONSTITUTIONAL LAW**, 3.

See **CRIMINAL LAW**, 7—**INTOXICATING LIQUORS**—**MUNICIPAL CORPORATIONS**, 2.

**CORPORATIONS.**

*See* COMPANY — MUNICIPAL CORPORATIONS.

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**CORROBORATION.**

*Evidence of.*]—*See* EXECUTORS AND ADMINISTRATORS, 1—GIFT, 2.

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**CORRUPT PRACTICES.**

*Enquiry into.*]—*See* PARLIAMENT, 5—CONSTITUTIONAL LAW, 3.

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**COSTS.**

1. *Security for Costs—Notice of Payment in—Time—Noting Pleadings as Closed—Con. Rules 346, 1204, 1207.*]—When a plaintiff having complied with an order for security for costs by paying the prescribed sum into Court, gives notice of such payment in, as required by Con-Rule 1207, the defendant is entitled to at least one day to ascertain if such payment in has really been made, and to file his defence, before the plaintiff can note the pleadings as closed. *Northern Elevator Co. v. North-West Transportation Co.*, 23,

2. *Security for—Granting Additional—Practice.*] While the practice as to granting additional security for costs has been relaxed in favour of the granting of such security, the plaintiff, however, must not be checked at every stage of the action by security being ordered,

dollar for dollar, for all costs incurred, or which might be incurred, without regard to the conduct of the parties.

On the commencement of an action, security to the amount of \$200 was ordered. After the action had proceeded \$300 further security was ordered; and, on a commission to take evidence being issued, a further sum of \$100. On the action coming on for trial, the defendant was granted leave to amend his pleadings; and, on the plaintiff stating that he was not ready to proceed on the amended record, the trial was postponed, the costs of the day being made costs in the cause to the successful party. The defendant then obtained an order from the local Master directing \$600 further security to be given.

On an appeal to a Judge, the order was set aside on the ground that the application for such additional security should have been to the Judge at the trial at the time the postponement was asked for. *Standard Trading Co. v. Seybold*, 379.

3. *Security for—Residing out of Ontario—Con. Rule 1198 (a).*]—The plaintiff was an agent, resident in Detroit, of a joint stock company carrying on business in Ontario, with its head office at Woodstock, where his wife and family resided. He visited his family once a fortnight, and sometimes once a month, but not, as a rule, for more than a day and a half at a time:—

*Held*, on motion for security for costs under Rule 1198 (a) that the plaintiff under the above circumstances must be held to reside in Ontario. *Moffat v. Leonard*, 383.

4. *Railway—Expropriation of Land—Abandonment.*]—The word “desist” in C.S.C. ch. 66 sec. 11, sub-sec. 6, has the same meaning as “abandon” in 51 Vict. ch. 29. sec. 158 (D.), *i.e.*, to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the land-owner.

*Widder v. Buffalo and Lake Huron R. W. Co.* (1865), 24 U.C.R. 222, 234, applied and followed. *Re Oliver and Bay of Quinte R.W.Co.*, 543.

5. *Security for—Increase—Appeal to Court of Appeal—Application for—Con. Rules 826, 827, 830.*]—An application for increased security for costs on an appeal from the High Court must be made to the Court of Appeal or a Judge thereof.

*Centaur Cycle Co. v. Hill* (No. 2) (1902), 4 O.L.R. 493, followed. *Fitzgerald v. Wallace*, 634.

See MUNICIPAL CORPORATIONS, 2—CONSTITUTIONAL LAW, 3.

## COURTS.

*County Court Judge—Certificate for Appeal—Discretion.*] See APPEAL.

See DIVISION COURTS—LANDLORD AND TENANT, 2—PRACTICE, 5—REGISTRY LAWS, 2.

## COVENANT.

See PRINCIPAL AND SURETY, 2.

## CRIMINAL LAW.

1. *Keeping Common Gaming Houses — “Gain” — Payment for Refreshments — Profit — Misdirection—Acquittal of Defendant—Crown Case Reserved—New Trial.*]—The defendant was indicted for keeping a common gaming house, contrary to secs. 196 (a) and 198 of the Criminal Code. The former defines a common gaming house as a house, room, or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing “poker.” Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of



the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play:—

*Held*, that "gain" may be derived indirectly as well as directly; that by what the defendant allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players.

The direction of the Judge at the trial to the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved for the Crown, but the Court declined to order a new trial.

*Per OSLER, J. A.*:—A case should not be reserved at the instance of the prosecutor after an acquittal. *Rex v. James*, 35.

2. *Bigamy — Defence — Dissolution of Former Marriage—*

*Decree of Foreign Court—Validity—Domicile.*]—Upon an indictment of the defendant for bigamy, the defence was, that she had been divorced from her husband by the decree of a foreign Court:—

*Held*, that the marriage being a Canadian one, and the domicile of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed.

*Magurn v. Magurn* (1883-5), 3 O.R. 570, 11 A.R. 178, and *LeMesurier v. LeMesurier*, [1895] A.C. 517, followed.

*Per OSLER, J. A.*:—The Court of Appeal should not be asked, by a reserved case, to solve questions on which the validity of a conviction does not necessarily depend. *Rex v. Woods*, 41.

3. *Procuring Personation of Voter — Ontario Liquor Act, 1902 — Ontario Election Act, 1902, secs. 167, 168—Procuring Person to Vote Knowing that he has no Right.*]—The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question:—

*Held*, that the conviction was justified under sec. 168 of the Ontario Election Act, R. S. O. 1897, ch. 9 (made applicable by sec. 91 of the Liquor Act), although the evidence shewed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a voter at such polling place. Section 167 (1) makes the counselling or procuring of personation a corrupt practice, but does not provide a punishment; and sec. 168 is in terms wide enough to cover the offence. *Rex v. Coulter*, 114.

4. *Necessaries — Medical Treatment — Christian Science — Evidence of Bona Fides — Criminal Code, secs. 209, 210 — 55-56 Vict. ch. 29 (D.).*—The word "necessaries" in sec. 209 of the Criminal Code—which enacts that every one who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessities of life—includes proper medical aid, assistance, care and treatment.

And, therefore, where the jury found that the prisoner, a Christian Scientist, had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age, when it was reasonable and proper that such treatment should be provided, and that

the child died from such neglect:—

*Held*, that the defendant had been guilty of an indictable offence under sec. 210 of the Code, which enacts that every one who as parent, guardian, or head of a family, is under a legal duty to provide necessities for any child under sixteen, is criminally responsible for omitting without lawful excuse so to do.

*Held*, also, that evidence of cures effected by Christian Science treatment was not admissible.

The law of the land must be obeyed even though there be something in the shape of belief in the conscience of the person coming under its obligation, which would lead him to obey what, in his state of mind, he may consider a higher power or authority.

*Semble*, medical aid, assistance, and treatment by some one other than a legally qualified physician or practitioner belonging to one of the recognized schools of medicine, may in some cases satisfy the requirements of the Code. *Rex v. Lewis*, 132.

5. *Criminal Procedure — Private Prosecutor — Right to Conduct Proceedings — R. S. O. 1897, ch. 96, sec. 9 (3).*—A private prosecutor is no party to a criminal prosecution, and cannot insist that he or his counsel shall aid in the conduct thereof. *Rex v. Gilmore*, 286.

6. *Criminal Procedure—Trial—Cross-examination—Right to Re-examine.*]—The right to re-examine follows necessarily upon cross-examination, even as to matter elicited during the latter which is both inadmissible and volunteered. Such matter should be expunged at the instance of the cross-examiner if it be desired to avoid re-examination. *Rex v. Noel*, 385.

7. *Criminal Procedure—Several Charges—Hearing Evidence on Second Charge Before Deciding First—Conviction.*]—Prisoners were charged before a County Judge on two separate charges of receiving, on two separate days, stolen goods knowing them to be stolen, and of house-breaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge, on Dec. 23rd, the Judge found a *prima facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On December 30th he tried them on the third charge, and acquitted them on it. On December 31st he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the evidence on the second, and was not conscious of having been biased on the second, by the evidence given on the first and

third; also that no objection was taken by counsel:—

*Held*, that inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the person charged, and in respect to the principal witness, and in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges, the convictions should be upheld. *Rex v. Bullock and Stevens*, 663.

8. *Obstructing Distress—Onus on Crown to Prove Legality of Distress—Criminal Code, sec. 144 (2)—55-56 Vict. ch. 29 (D.)*]—Sec. 144 (2) of the Criminal Code enacts that “everyone is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress . . .”:—

*Held*, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as, for example in this case, that there was rent due and in arrear. *Rex v. Harron*, 668.

See CRIMINAL LAW, 7.

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### CROWN CASE RESERVED.

See CRIMINAL LAW, 1.

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### DAMAGES.

*Future Commissions—Master and Servant.*]—The plaintiff

was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause, sales to a large amount having up to that time been effected by him:—

*Held*, that in estimating the damages to which he was entitled the commission on sales which there was reasonable ground to think might have been effected during the unexpired portion of the term, should be taken into consideration.

Judgment of Ferguson, J., (1902), 4 O.L.R. 350, reversed. *Laishley v. Gould Bicycle Co.*, 319.

*Special.*] — See MUNICIPAL CORPORATIONS, 4.

*Action for.*]—See PLEADING, 1.

*Measure of.*]—See RAILWAYS, 3.

See CHOSE IN ACTION, 3, 4—  
INJUNCTION—SALE OF GOODS—  
SHIP—VENDOR AND PURCHASER, 1.

### DEBENTURES.

See MUNICIPAL CORPORATIONS, 6—WILL, 5.

### DEBTOR.

*Disposal of Property.*]—See INJUNCTION.

### DEDICATION.

See MUNICIPAL CORPORATIONS, 8.

### DEED.

*Forged Conveyance.*]—See LAND TITLES ACT.

### DEFAMATION.

*Libel* — “S.B.” — *Innuendo.*] — The defendant, a tax collector, having applied to the plaintiff for payment of certain taxes, was told by him that J.S. should pay them. He subsequently wrote and mailed to the plaintiff a post card stating “I saw J.S. this morning; he said make the S.B. pay it.”

In an action for libel, in which the plaintiff claimed that “S.B.” applied to him, and meant “son of a bitch”:—

*Held*, that in its primary and obvious meaning the language of the post card was harmless; and the letters “S.B.” not having acquired in the vernacular any meaning as a customary abbreviation of any particular phrase or expression, and the plaintiff having given no evidence that they conveyed the meaning attributed to them by him, he had failed to establish any cause of action. *Major v. McGregor*, 528.

### DEFENDANTS.

*Joinder of Rules 186, 187.*] — See PRACTICE, 9.



**DELAY.**

*Trial of Petition.*] — See  
PARLIAMENT, 3.

See VENDOR AND PURCHASER,  
1—TRUSTS AND TRUSTEES, 3.

**DEPUTY RETURNING OFFICER.**

See MANDAMUS.

**DETINUE.**

*Demand and Refusal after Action—Inference of Conversion before Action—Husband and Wife.*]—The plaintiff left her husband, the defendant, on the 21st October, 1902, and brought this action for certain chattels of hers which remained upon his land, and for pecuniary damages for the detention thereof. On the 27th November, 1902, after the action had been begun, she went to his house and demanded her property. He said, in effect, that he did not wish her to take her things away, because he was anxious that she should go back to live with him, and did not consent to her removing the articles, but that she might remove or leave them as she saw fit:—

*Held*, that this did not shew such a refusal of her demand as would enable her to sustain the action, if a demand and refusal after action were sufficient in detinue, as to which *quære*.

*Semble*, that, if the action had been for the conversion of the plaintiff's property, nothing was

shewn from which the inference that there had been a conversion before action could properly be drawn.

Judgment of Falconbridge, C.J.K.B., reversed. *Lintner v. Lintner*, 643.

**DEVISE.**

See WILL, 9.

**DEVOLUTION OF ESTATES.**

1. *Sale of Land by Administrator—Non-concurring Adult Heirs — Approval of Official Guardian—R.S.O. 1897, ch. 127, sec. 16.*]—An administrator desired to sell certain lands pursuant to his powers under section 16 of the Devolution of Estates Act, R.S.O. 1897, ch. 127. There were certain heirs who were *sui juris*, but whose concurrence in the sale had not been sought or obtained because of the delay and expense which would be involved in so doing:—

*Held*, that, nevertheless, it was proper for the official guardian to approve of the sale, pursuant to his powers so to do under that section, if, after he had made the usual enquiries as in a case of infant heirs or devisees, no good reasons were advanced or discovered for his refusing to do so. *Re Bradley's Estate*, 397.

2. *Devolution of Estates Act—Relations of the Half Blood.*]—

In the distribution under the Devolution of Estates Act of the real and personal estate of an intestate, brothers and sisters of the half blood share equally with those of the whole blood. *Re Wagner*, 680.

3. *Distribution of Estates—Next of Kin—Collateral Relatives—Per Capita Distribution—Half Blood—Double Blood.*]—An intestate was possessed of both real and personal property, and left no wife, child, father, mother, uncle or aunt. His next of kin were cousins, some of whom were the children of his father's half brother, and one of whom was the niece both of his father and mother:—

*Held*, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now distributable. Collateral relatives in the same degree of kinship take equally in their own rights, not by way of representation; those of the half blood take equally with those of the whole blood; and those of the double blood take no more. *Re Adams*, 697.

### DIRECTORS.

*Liability of.*]—See JUDGMENT, 2.

### DISCOVERY.

See EVIDENCE, 1—PARLIAMENT, 5.

### DISCRETION.

See MUNICIPAL CORPORATIONS, 1—PARLIAMENT, 3, 5—PRACTICE, 7.

### DISTRESS.

*Obstructing.*]—See CRIMINAL LAW, 8.

See INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS, 2.

### DISTRICT COURTS.

*Jurisdiction—Recovery of Land—Mortgages—Injunction—High Court Action—Multiplicity.*]—The plaintiffs, being mortgagees of land, issued out of the district court for the district in which the land was situated a writ of summons indorsed with a claim to "recover possession" of the land "and for an order that the defendants do forthwith deliver up possession" thereof, describing the land:—

*Held* that the indorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R.S.O. 1897, ch. 109, sec. 9, sub-sec. 2 (d).

*Independent Order of Foresters v. Pegg* (1899-1900), 19 P.R. 80 distinguished.

The facts that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same land, in which they might have claimed the same relief as in the other action, was not a ground

from enjoining the plaintiffs from proceeding in the district court. *Central Trust Co. of New York v. Algoma Steel Co.*, 464.

### DIVISION COURTS.

*Jurisdiction — Dividing Cause of Action — Division Courts Act, sec. 79 — Promissory Note — Including in Larger Claim — Proof against Insolvent Estate.*]—The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, made by defendants, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim:—

*Held*, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a division court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of sec. 79 of the Division Courts Act, R.S.O. 1897, ch. 60, forbidding the dividing of a cause of action. *Harvey et al. v. McPherson et al.*, 60.

### DIVISIONAL COURTS.

*Power of Master to Refer Matter to.*]—See PRACTICE, 5.

### DIVORCE.

*Decree of Foreign Court.*]—  
See CRIMINAL LAW, 2,

### DOMICILE.

See CRIMINAL LAW, 2.

### DOMINION LEGISLATION.

See CONSTITUTIONAL LAW, 1—  
EXECUTORS AND ADMINISTRATORS, 2.

### DONATIO MORTIS CAUSA.

See GIFT, 1, 2.

### DOWER.

1. *Equity of Redemption — Conveyance by Husband Alone — 42 Vict., ch. 22 (O.) — Discharge of Mortgage — Effect of.*]—  
On the 8th February, 1881, the owner of land subject to a mortgage, dated the 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the money advanced upon the second mortgage was applied in payment of the first mortgage, and the first mortgagees executed a discharge, which was registered on the 5th March, 1881. On the 30th September, 1881, the owner executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar dower. Nei-

ther the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the mortgagees, in the exercise of the power of sale, on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th February, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of the 30th September, 1881, brought this action for dower on the 11th September, 1902:—

*Held*, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 Vict. ch. 22 (O.), which became law on the 11th March, 1879.

(2) The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to re-vest the premises in the mortgagor, but in the second mortgagees.

Judgment of Lount, J., reversed. *Anderson v. Elgie*, 147.

2. *Bar of Dower—Infant Wife—Purchaser for Value—R.S.O. 1897, ch. 165, sec. 5.*—An infant wife joined to bar dower in a deed from her husband to a purchaser for value, but after the former's death nevertheless brought this action for dower:—

*Held*, that by sec. 5 of the Married Woman's Real Estate Act, R.S.O. 1897, ch. 165, the infancy of the plaintiff was immaterial, and her right was barred.

A father conveyed land to his son in pursuance of a preceding agreement between them that he would do so if the son would work the land with him for the next ensuing season:—

*Held*, that the son was a purchaser for value within the meaning of the above section. *Crossett v. Haycock*, 259.

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### ELECTION.

*See* PARLIAMENT, 1, 3, 4, 5—  
TRUSTS AND TRUSTEES, 4.

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### ELECTRIC LIGHT COMPANY.

*See* ASSESSMENT AND TAXES, 1.

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### ELECTRICITY.

*See* NEGLIGENCE, 3.

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### EQUITABLE ASSIGNMENT.

*See* CHOSE IN ACTION, 2.

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### EQUITABLE EXECUTION.

*See* RECEIVER.



**EQUITY OF REDEMPTION.**

*See* DOWER, 1—EXECUTION.

**ESCROW.**

*See* VENDOR AND PURCHASER, 2.

**ESTATE.**

*Distribution of*—*See* DEVOLUTION OF ESTATES ACT, 1, 2, 3.

**ESTOPPEL.**

*See* PARTNERSHIP.

**EVIDENCE.**

1. *Discovery—Production—Action for Penalties.*—It is improper in an action to recover penalties under the Extra-Provincial Corporations Act, 63 Vict. ch. 24 (O.), to issue the usual præcipe order for production of documents by the defendants.

Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside. *Johnston v. London and Paris Exchange*, 49.

2. *Discovery—Examination of Officer of Company—Agent of Unincorporated Association.*—The plaintiffs sued “The Tanners’ Association,” a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their

own name “sued as the Tanners’ Association.”—

*Held*, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending. *Ahrens et al. v. Tanners’ Association*, 63.

*Admissibility.*—*See* PRACTICE, 5.

*Of Lost Will.*—*See* WILL, 5.

*See* CRIMINAL LAW, 4—EXECUTORS AND ADMINISTRATORS, 1—GIFT, 2—INSURANCE, 1—NEGLIGENCE—REGISTRY LAWS, 2.

**EXAMINATION.**

*Of Assignee.*—*See* BANKRUPTCY AND INSOLVENCY.

*For Discovery.*—*See* EVIDENCE—PARLIAMENT, 5—PRACTICE, 5.

**EXCHANGE.**

*Power of.*—*See* WILL, 6.

**EXECUTION.**

*Fi. fa. Lands—Sale of Equity of Redemption—Purchase by Execution Creditor—Subsequent Conveyance to Debtor—Covenants—Incumbrances—Release.*—Under a writ of *fi. fa.* against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the

purchaser in 1896. The purchaser was at that time the assignee of the judgment upon which the *fi. fa.* was founded. After holding the interest acquired by his purchase for a year, he sold it to the mortgagor, and made to him the usual short form conveyance under R.S.O. 1897, ch. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and thereafter an *alias* writ of *fi. fa.* lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage:—

*Held*, that the land was not affected by the judgment and execution while the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the *fi. fa.*; and the statutory covenants, No. 4 as to incumbrances, and No. 8 as to the release of all claims, contained in the conveyance by the purchaser to the mortgagor, did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance. *Chittick v. Lowery et al.*, 547.

*Staying.*]—See COMPANY, 2.

## EXECUTORS AND ADMINISTRATORS.

1. *Evidence—Corroboration*—*R.S.O. 1897, ch. 73, sec. 10.*—Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of and endorsed by the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or in respect of advances.

Judgment of the Master in Ordinary affirmed. *Re Jelly, Union Trust Co. v. Gamon*, 481.

2. *Executor desontort—Payment by—Statute of Limitations—Bills of Exchange Act—Dominion and Provincial Legislation—Joint Contract*—*R.S.O. 1897, c. 129, s. 15.*—Although a payment or acknowledgement by an executor desontort will not displace the bar of the statute of limitations in an action against a lawful personal representative, yet where an executor desontort had made payments of interest in respect to a promissory note, within six months before action commenced, and the holder of the note brought action against her to make her answerable to the extent of the goods of the deceased come to her hands:—

*Held*, that the defendant

could not by setting up that she was a wrong-doer and not the true representative, escape the effect of the payments giving a new start to the statute, as between herself and the plaintiff. An executor de son tort must be treated as the true representative of the deceased, as respects payments made by him and their effect.

The Bills of Exchange Act does not deal with the consequences which are to flow from the character which it attaches to the promise which a bill or note contains; and, therefore, these consequences fall to be determined according to the law of the Province in which the liability is sought to be enforced. *Cook v. Dodds*, 608.

*Sale of Land.*]—See DEVOLUTION OF ESTATES.

*Debts and Expenses of Administration.*]—See WILL, 7.

See TRUSTS AND TRUSTEES, 3 —WILL, 9.

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### EXPROPRIATION.

*Of Land.*]—See CONSTITUTIONAL LAW, 1 — COSTS, 4 — SCHOOLS, 2.

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### FARM CROSSING.

See RAILWAYS, 2.

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### FEEES.

See SHERIFF.

### FINAL ORDER.

See COMPANY, 1.

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### FIRE INSURANCE.

See INSURANCE.

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### FORECLOSURE.

See PRACTICE, 3.

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### FOREIGN COMPANY.

*Shares in.*]—See RECEIVER.

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### FOREIGN JUDGMENT.

*Action on — Declaratory Judgment — Simple Contract Creditor—Preliminary Relief—Statute of Limitations—R.S.O. 1897, vol. III., ch. 324, sec. 40.*] —A creditor under a Quebec judgment asked a declaration that the judgment debtor was beneficial owner of a certain claim against the Dominion Government:—

*Held*, that being in this Province in the position of a simple contract creditor only, he was not entitled to such preliminary relief, for the same reasons which debar a simple contract creditor from taking garnishee proceedings or proceedings for equitable execution; and also because the claim being one against the government no consequential relief was or could be asked.

*Held*, also, that being more than six years old, the judgment, being in this Province merely a simple contract debt, would under ordinary circumstances have become barred, yet since the judgment debtor was not at the time of their recovery, nor had been since, in this Province, the plaintiff's remedy on it was saved by R.S.O. 1897, vol. III., ch. 324, sec. 40. *Stewart v. Guibord et al.*, 262.

*Against Corporation.*] — See PARTNERSHIP.

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### FOREIGN LAW.

See CRIMINAL LAW, 2.

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### FRAUD.

See INJUNCTION — LAND TITLES ACT.

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### FRAUDS, STATUTE OF.

See VENDOR AND PURCHASER, 2.

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### FRIENDLY SOCIETY.

See INSURANCE, 2.

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### GAMING.

See CRIMINAL LAW, 1—INTOXICATING LIQUORS.

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### GIFT.

1. *Donatio Mortis Causá*—*Moneys and Notes*—*Delivery of*

*Keys.*]—The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, and while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, and said, "all the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk.

There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant—she retained the keys until his death, which occurred from the same illness a fortnight afterwards:—

*Held*, that there was a good *donatio mortis causá*.

*Re Mustapha, Mustapha v. Wedlake* (1891), 8 Times L.R. 160 followed. *Charleton v. Brooks*, 87.

2. *Donatio Mortis Causá*—*Savings Bank Deposit*—*Delivery of Pass Book*—*Evidence*—*Corroboration.*]—The money at the credit of a savings bank depositor may pass as a *donatio mortis causá* by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book.

Any evidence which is sufficient to prove any fact against the estate of a deceased person



is sufficient to prove a *donatio mortis causá*, that is, any evidence which is believed and is corroborated as required by the statute, may be acted upon. *Re Reid*, 421.

*Absolute Condition.*] — *See* WILL, 9.

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### GOODS.

*Carriage of.*]—*See* RAILWAYS, 5.

*Sale of.*]—*See* JUDGMENT, 2—SALE OF GOODS.

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### GUARANTEE.

*See* PRINCIPAL AND SURETY, 1.

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### HABEAS CORPUS.

*See* CONSTITUTIONAL LAW, 3.

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### HEAD OFFICE.

*See* VENUE, 2.

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### HEIRS.

*Dying without.*]—*See* WILL, 4.

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### HOSPITAL.

*See* CONTRACT, 1.

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### HUSBAND AND WIFE.

*Liability of Husband for Torts of Wife.*]—*Held*, affirming the judgment of Street, J., that a husband is still liable for the

torts of his wife, if the marriage took place before the 1st July, 1884. The provisions of the Married Women's Property Act, 1884, 47 Vict. ch. 19 (O.), applicable to persons married before that date, do not relieve him from liability.

*Earle v. Kingscote* (1900), 2 Ch 585, applied and followed.

*Amer v. Rogers* (1880), 31 C.P. 195, overruled.

*Lee v. Hopkins* (1890), 20 O.R. 666, approved. *Traviss v.*

*Hales et ux.*, 574.

*Equity of Redemption.*]—*See* DOWER, 1.

*See* DETINUE—DOWER, 2.

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### IMPRISONMENT.

*See* INTOXICATING LIQUORS—CONSTITUTIONAL LAW, 3—MUNICIPAL CORPORATIONS, 2.

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### INCOME.

*See* WILL, 9.

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### INDIAN LANDS.

*Assignment of Timber—Interest in Land—Registration—Conditional Assignment—Priorities—Actual Notice.*]—The owner of unpatented Indian lands administered by the Department of Indian Affairs for Canada, under the provisions of the Indian Act, R.S.C. 1886, ch. 43, made a sale of certain timber thereon and executed an assignment or transfer to the vendee, by which the vendor agreed to

sell and the vendee to purchase all the timber of a certain specified kind upon the land described, for a named price, payable as set out, and by which the vendee was "to have five years from the date hereof to cut and remove the said timber, having the right to make roads and go in and out of the said property during the said term."—

*Held*, that the interest assigned was an interest in land, and not a mere chattel interest.

*Summers v. Cook* (1880), 28 Gr. 179, and *Ford v. Hodgson* (1902), 3 O.L.R. 526, followed.

*Held*, also, that the assignment was not an unconditional assignment within the meaning of sec. 43 of the Indian Act, and was incapable of being registered in the manner prescribed by the Act, and therefore did not require registration to preserve its priority, and was entitled to priority over a subsequent registered assignment.

*Harrison v. Armour* (1865), 11 Gr. 303, followed.

*Semble*, that, although there is no provision in the Indian Act as to "actual notice," the law laid down in *Agra Bank v. Barry* (1874), L.R. 7 H.L. 135, at pp. 147, 148, would apply if the subsequent assignee had at the time of registration such notice of the prior assignment. *Bridge v. Johnston*, 370.

### INFANT.

See DOWER, 2.

### INFORMATION.

See JUSTICE OF THE PEACE.

### INJUNCTION.

[*Debtor Disposing of Property—Status of Creditor—Verdict for Damages—Fraud.*]—The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property. *Burdett v. Fader*, 532.

See DISTRICT COURTS—MUNICIPAL CORPORATIONS, 3.

### INSANITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

### INSURANCE.

1. *Fire Insurance—Renewal Contract—Evidence of.*]—On an appeal by the plaintiff in this case from the judgment of Street, J., reported 4 O.L.R. 303, the judgment was affirmed, on the ground that there had been no renewal contract of insurance and the appeal was dismissed with costs. *Doherty et al. v. Millers and Manufacturers Ins. Co.*, 78.

2. *Life Insurance—Friendly Society—Altering Beneficiary—Privileged Beneficiary—Statutory Restrictions—Paramount Authority of Insurance Act—R.S.O. 1897, ch. 203, sec. 151*—The designation of a beneficiary in an Ontario contract of insurance can be revoked, and the benefit diverted to another, only within the limits laid down by the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reserved, and to the by-laws of the insurers, which by-laws permit the desired change. Thus in such a case the attempted diversion of the benefit from a beneficiary of a privileged class to a beneficiary not belonging to that class was held invalid by reason of subsec. 3 of sec. 151 of the Act. *Lints v. Lints*, 100.

3. *Fire Insurance—Cancellation—R.S.O., 1897, ch. 203—Statutory Condition 19 (a)—Notice of Cancellation Received after Loss.*—The insured sent to the company his policy with an indorsed surrender clause, executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire:—

*Held*, that the letter did not

take effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt, that the attempted surrender did not operate, and, therefore, the company was liable for the loss.

Judgment of Lount, J., 4 O.L.R. 123, affirmed. *Skillings v. Royal Ins. Co.*, 401.

4. *Life Insurance—Medical Examination—Misstatements and Concealments—Materiality—Breach of Warranty—Cancellation of Policy.*—In the plaintiff's application to the defendants for a policy of life insurance he warranted, amongst other things, that the answers in the medical examination, which formed part thereof, were full, complete, and true, and without any suppression of facts, so far as such answers were material to the contract of insurance to be based thereon.

In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of "la grippe," for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who told him he was

suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing:

*Held*, that these statements and concealments were material and constituted a breach of warranty; and therefore the policy was void.

Judgment was given for the defendants on their counterclaim for delivery up of the policy to be cancelled. *Smith v. Grand Orange Lodge of British America*, 588.

5. *Fire Insurance—Policy on Goods—Partial Loss—Other Insurance — Proportionate Payment—Conditions of Policy—Construction — Overvaluation.*]—The insurance was upon goods valued in the application at \$15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of \$6,250. The defendants' policy was for \$3,000; there was other insurance to the amount of \$7,000; and the total value of the goods at the time of the fire was \$9,274.62. Statutory condition No. 9 provides that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then

this company shall, if such other insurance remains in force, on the happening of any loss or damage only be liable for the payment of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was indorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property other than buildings, if the property insured is found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application."

*Held*, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss, in accordance with statutory condition No. 9.

Judgment of Meredith, C.J. C.P., affirmed. *Eacrett v. Gore*



*District Mutual Fire Ins. Co.*, 592.

6. *Fire Insurance*—*Signature by Agent per proc.—Delegatus non Potest Delegare.*—*Held*, that the defendants were not bound by a policy which contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company, but which, in fact, was signed but without any authorization by him, in the name of one who had lately been agent, by one of his clerks, who while he was agent was accustomed to sign for him, and this even though the insured might not have known of the cessation of the agency.

Judgment of Falconbridge, C.J., affirmed. *Walkerville Match Co., Limited, v. Scottish Union and National Ins. Co.*, 674.

See PRINCIPAL AND AGENT—RECEIVER.

### INTEREST.

1. *Money of Company Improperly Withdrawn*—*President and Manager--Trustee--Statute of Limitations*—*Reference*—*Powers of Master.*—The appellant, who was for many years the president and general manager as well as the principal shareholder of an incorporated company, withdrew from the funds of the company, between the 1st August, 1889, and December, 1900, at the rate of \$5,025 per annum, as salary in

addition to his regular salary. He assumed to do this under a resolution authorizing the payment of extra remuneration to the "staff," but it was held by the Court of Appeal (27 A.R. 540), and by the Judicial Committee ([1902] A.C. 83), that the resolution did not apply to him, and he was ordered to account for the moneys received during the whole period, notwithstanding a plea of the Statute of Limitations:—

*Held*, that his position was that of a trustee for the company and that he was chargeable with interest on the moneys received.

*Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519, followed.

*Held*, also, that the Master upon a reference had power under Con. Rule 666 and 667 to charge the appellant with interest, although the judgment directing the reference was silent on the subject.

Judgment of Meredith, C.J. C.P., affirmed. *Earle et al. v. Burland et al.*, 327.

2. *Contract— Chattel Mortgage*—*Statement of Rate—Interest Act, 1897*—60, 61 Vict. ch. 8 (D.)—*Statutes—Waiver.*—A chattel mortgage provided for the payment of \$125, the principal money, in consecutive monthly instalments of \$5 each, and for payment of \$5 more with each instalment for interest. The yearly rate to which this was equivalent was not stated, but there was a

clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897:—

*Held*, that this being an Act passed on grounds of public policy for the benefit of borrowers its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate.

Judgment of Snider, Co. J., affirmed. *Dunn v. Malone*, 484.

*Rate of.*]—See TRUSTS AND TRUSTEES, 4.

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### INTERLOCUTORY ORDER.

See APPEAL.

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### INVESTMENT.

See TRUSTS AND TRUSTEES, 4.

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### INTOXICATING LIQUORS.

*Liquor License Act—Powers of License Commissioners—Resolution Prohibiting Games of Chance on Licensed Premises—“Euchre”—Knowledge of Licensee—Conviction—Form—Distress—Imprisonment—Costs.*]—A board of license commissioners, under the authority of the Liquor License Act, R.S.O. 1897, ch. 245, sec. 4, sub-sec. 4, passed a resolution “that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of

public entertainment . . . or on the premises:”—

*Held*, MACMAHON, J., dissenting, that the powers of the commissioners, under sec. 4, were not restricted by sec. 81, and that the resolution was within their powers.

Four persons played “euchre” for amusement in a room behind the bar of the defendant’s hotel, the cards used being the property of one of the players, a boarder in the hotel:—

*Held*, that “euchre” is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge.

*Held*, also, that sec. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress, and, in default of distress, imprisonment, was authorized.

*Held*, also, that where the license inspector attends court as prosecutor he is to be allowed certain expenses by way of costs, as provided in sec. 117, and there was nothing wrong in the amount (\$4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction. *Rex v. Laird*, 180.

See MANDAMUS.

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### JOINT STOCK COMPANY.

See COMPANY, 1.

**JUDGE.**

*Jurisdiction of.*]—See CONSTITUTIONAL LAW, 3—REGISTRY LAWS, 2.

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**JUDGMENT.**

1. *Motion for* — “*Debt or Liquidated Demand*” — *Con. Rules 138 and 603.*] — The defendant having entered into an agreement to manufacture for and deliver timber to the plaintiff received from him certain advances in money exceeding the value of the timber actually delivered; and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained.

In an action to recover the balance of the advances unpaid:

*Held*, that the claim was not a “debt or liquidated demand” within the meaning of *Con. Rule 138*: and an order of a local Judge, giving leave to sign judgment under *Con. Rule 603*, was set aside. *McIntyre v. Munn*, 290.

2. *Motion for under Rule 603*—*Goods Sold and Delivered* — *Company* — *Admission of Amount*—*Excess of Statutory Limit*—*Directors’ Liability*—*R.S.O. 1897, ch. 199, secs. 11 and 40.*]—In an action against a company incorporated under *R.S.O. 1897, ch. 199*, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up

that their indebtedness when the goods were purchased largely exceeded the limits prescribed by secs. 11 and 40 of that Act, and that the directors were personally liable and not the company, a motion for summary judgment was dismissed.

*Jacobs v. Booths’ Distillery Co.* (1901), 85 L.T.N.S. 262, followed. *Canadian General Electric Co. (Limited) v. Tagona Water and Light Co.*, 641.

See FOREIGN JUDGMENT — PARTNERSHIP — TRUSTS AND TRUSTEES, 2.

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**JURISDICTION.**

*Of Judge.*]—See CONSTITUTIONAL LAW, 3.

*Lex fori.*]—See EXECUTORS AND ADMINISTRATORS, 2.

*Of District Courts.*] — See DISTRICT COURTS.

*Service out of.*]—See PRACTICE, 6, 8.

*Office of Company.*]—See VENUE, 2.

See DIVISION COURTS.

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**JURY.**

See CONSTITUTIONAL LAW, 3.

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**JUSTICE OF THE PEACE.**

*Penalty* — *Excessive Fee* — *Information for Indictable Offence* — *Pleading* — *Amendment.*]—An information having

been laid by the plaintiffs before the defendant, a justice of the peace, for an indictable offence under secs. 210 (2) and 215 of the Criminal Code, over which the defendant had no summary jurisdiction as a justice :—

*Held*, that he was not entitled to any fee whatever, and that the plaintiffs, while they were entitled to recover by action the amount of the fee which they paid, could not maintain an action under sec. 3 of R.S.O. 1897, ch. 95, or under sec. 902, sub-sec. 6, of the Criminal Code, to recover a penalty from the defendant for receiving a larger amount of fees as justice of the peace than he was entitled to.

*Bowman v. Blyth* (1856), 7 E. & B. 26, applied and followed.

It was alleged by the statement of claim that the defendant wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiffs the sum of, etc., contrary to the Ontario Act. At the trial the plaintiffs were allowed to amend by substituting “wilfully” for “maliciously and without reasonable or probable cause,” and by making an alternative claim under sec. 902, sub-sec. 6, of the Criminal Code.

*Held*, that the amendments were properly made. *McGillivray et al. v. Muir*, 154.

## LAND.

*Expropriation of.*] — See COSTS, 4.

*Dedication of for Park.*]—  
See MUNICIPAL CORPORATIONS, 3.

*Agreement to Purchase.*]—  
See RAILWAYS, 3.

See ASSESSMENT AND TAXES,  
1—DEVOLUTION OF ESTATES, 1  
—DISTRICT COURTS—EXECUTION  
—INDIAN LANDS—SCHOOLS, 2.

## LANDLORD AND TENANT.

1. *Expiry of Lease--Continuation of Possession by Tenant—Special Agreement—Tenancy at Will.*]—Although payment of rent in aliquot proportions of a year is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year, yet such payment does not create the tenancy, but is only evidence from which the Court or jury may find the fact :—

*Held*, therefore, in this case where the landlord, before he accepted any rent after expiry of a lease, told the tenants that he would not consent to any tenancy from year to year, but that they should remain as they were on expiry of the lease, to which they assented, that the parties were not tenants from year to year, but tenants at will, although rent continued to be paid as under the lease.

Tenants who, on expiry of lease, are permitted to continue in possession pending a treaty for a further lease, are not tenants from year to year, but tenants at will. *Idington v. Douglas*, 266.



2. *Overholding Tenant — Writ of Possession — Prohibition to County Judge and Sheriff — Certiorari — R. S. O. 1897, ch. 171, sec. 6.*—After an order had been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ had been issued, the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff:—

*Held, per* STREET, J., that proceedings under the Overholding Tenants Act can be removed into the High Court only when section 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief.

*Per* BRITTON, J., that whether section 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court.

Judgment of MacMahon, J., affirmed. *Re Warbrick and Rutherford*, 430.

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#### LAND TITLES ACT.

*R.S.O. 1897, ch. 138—Transfer by Owner—Fraud—Forged Conveyance from Transferee—Subsequent Purchaser for Value without Notice — Assurance*

*Fund — Claim on.*]—Plaintiff being the owner of land registered under the Land Titles Act, R. S. O. 1897, ch. 138, was by the fraud of two persons, G. and H., induced to transfer her land to one D. Subsequently a transfer to McD., purporting to be signed by D., was registered, but D.'s signature was forged. McD. then transferred to O'M., and O'M. to B., both being parties to the fraud with G. and H. B. then transferred to C. an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible, an action was brought by the plaintiff for compensation for the loss of the land out of the Assurance Fund under sections 130 and 132 of the Act:—

*Held*, that the plaintiff had not been "wrongly deprived" under sec. 132, and that she could not recover. *Fawkes v. Attorney-General for Ontario*, 490.

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#### LEASE.

*See* LANDLORD AND TENANT.

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#### LEGACY.

*Payment Out of Real Estate.*]—*See* WILL, 8.

*Specific.*]—*See* WILL, 1.

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#### LIBEL.

*See* DEFAMATION.

**LIEN.**

*Preservation of.*]—See REGISTRY LAWS, 1.

**LIFE.**

*Tenant for.*]—See SCHOOLS, 2. 1.

See TRUSTS AND TRUSTEES, 4.

**LIFE INSURANCE.**

See INSURANCE, 2, 4.

**LIMITATION OF ACTIONS.**

*Cause of Action—Commencement of—Statutory Mortgage—Acceleration of Payment of Mortgage Money.*]—The effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured, the principal thereby secured should become payable, is to make the principal at once due, so that the cause of action then accrues under sec. 1 of ch. 72, R.S.O. 1897, "An Act respecting the Limitation of certain Actions." *McFadden v. Brandon*, 247.

*Renewal of Writ.*]—See PRACTICE, 10.

See EXECUTORS AND ADMINISTRATORS, 2—FOREIGN JUDGMENT—INTEREST, 1—PRACTICE, 10—RAILWAYS, 4.

**LIQUIDATED DEMAND.**

See JUDGMENT, 1.

**LIQUORS.**

See INTOXICATING LIQUORS.

**LIS PENDENS.**

See VENDOR AND PURCHASER,

**LOCAL COURTS ACT.**

See REGISTRY LAWS, 2.

**LOCAL JUDGE.**

See PRACTICE, 10.

**MANDAMUS.**

*Police Magistrate—Sentence—Ontario Liquor Act, 1902—Voting on—Personation—Information—Deputy Returning Officer—Prosecutor—Applicant for Mandamus—Status.*]—At the voting upon the Ontario Liquor Act, 1902, the defendant presented himself at a polling place and asked for a ballot in the name of another person, whereupon, before the defendant had left the polling place, one S. laid an information before the deputy returning officer charging the defendant with personation, and on this information the deputy issued his warrant, under which the defendant was arrested and brought before a police magistrate. The deputy then laid an information against the defendant for personation, and the defendant was tried by the magistrate, convicted and sentenced:—

*Held*, affirming the decision of BRITTON, J., in the Weekly Court, that, having regard to the provisions of R.S.O. 1897, ch. 10 (made applicable by sub-sec.(5) of sec. 91 of the Ontario Liquor Act, 1902), the information which gave the magistrate jurisdiction was that laid by S.; and the deputy returning officer had no status to apply for a mandamus to the magistrate to impose a different sentence.

*Per* BRITTON, J., that a mandamus could not be granted for that purpose. *Re Denison. Rex v. Case*, 104.

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### MAGISTRATE.

*See* JUSTICE OF THE PEACE.

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### MARRIAGE.

*Contract in Restraint of.*]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

*See* CRIMINAL LAW, 2.

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### MASTER AND SERVANT.

*See* DAMAGES—NEGLIGENCE, 1.

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### MASTER.

*In Chambers.*]—*See* PRACTICE, 5, 10.

*Local Master—Powers of.*]—*See* INTEREST, 1.

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### MEDICAL ATTENDANCE.

*See* CONTRACT, 1.

### MINISTERIAL ACT.

*See* APPEAL.

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### MISDIRECTION.

*See* CRIMINAL LAW, 1.

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### MONEY PAYABLE.

*See* CHOSE IN ACTION, 4.

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### MORTGAGE.

*Discharge of.*]—*See* DOWER, 1.

*Cause of Action—Commencement of.*]—*See* LIMITATION OF ACTIONS.

*Assignment of.*]—*See* PRINCIPAL AND SURETY, 2.

*Bonds.*]—*See* RAILWAYS, 1.

*On Undertaking.*]—*See* RAILWAYS, 4.

*See* DISTRICT COURTS—PRACTICE, 3.

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### MORTMAIN.

*See* WILL, 3.

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### MOTION.

*Statement of Grounds in.*]—*See* BANKRUPTCY AND INSOLVENCY.

*For Judgment.*]—*See* JUDGMENT.

*Setting Aside Service.*]—*See* PRACTICE, 5.

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### MULTIPLICITY.

*Of actions.*]—*See* DISTRICT COURTS.

## MUNICIPAL CORPORATIONS.

1. *Money By-law—Procedure By-law—Violation of—Discretion.*]—The Court in the exercise of its discretion refused, under the circumstances set out in the case, to restrain a municipal council from acting upon a by-law for the payment of money not provided for on the face of the estimates, passed against the protest of the minority of the council and in contravention of the procedure by-law of the council, by being taken up by the full council before being submitted to a committee of the whole.

STREET, J., dissenting. *Hefernan v. Corporation of Walkerton*, 79.

2. *By-law—Transient Traders—Conviction—Penalty—Costs—Distress—Imprisonment—Uncertainty—Amendment—“Butcher.”*]—Upon motion to quash the conviction of the defendant, a transient trader, for offering meat for sale in quantities less than the quarter carcass, without having paid a license fee, contrary to a by-law of a village:—

*Held*, that it was not necessary that the by-law or conviction should contain the words “for temporary purposes” and “assessment roll for the then municipal year,” as they relate to the regulation of transient traders under clause 30 of sec. 583 of the Municipal Act, R.S.O. 1897, ch. 223, which refers to the payment of a license fee before beginning operations;

nor was it necessary to refer to or negative the provisions of 58 Vict. ch. 42, sec. 22 (O.), making the term “transient trader” applicable to one who has resided less than three months in the municipality before beginning business, the evidence showing brief visits periodically and regularly to sell meat for a given time at a particular place in the village.

(2) The objection that the penalty of \$1 was not apportioned under sec. 708 failed, because the application was otherwise provided for by the by-law.

(3) The objection that the conviction and by-law were in excess of the statute because power of distress was given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, was not well taken, having regard to the powers given by sec. 702, subsecs. 2 and 3.

(4) The uncertainty of the offence in the conviction as to date, place, and meat sold, should be cured by amendment, upon the facts in evidence, under 2 Edw. VII. ch. 12, sec. 15 (O.)

(5) Although secs. 580 and 581 deal specifically with the sale of meat, a transient trader, under sec. 583, might include a butcher or dealer in meat. *Rex v. Myers*, 120.

3. *Establishment of Park—By-law—Dedication of Land Held by Corporation in Fee—Subsequent Leases for Build-*



*ing Purposes — Injunction—  
Private Plaintiff—Interest.*]

A by-law was passed by the defendant corporation in 1880 purporting to "establish" a park on the "Island," which was granted to the corporation by the Crown in fee in 1867, and certain lots were designated therein which, "with such other lands as may hereafter be obtained from lessees or otherwise," were to form a park. Other lands were, in 1887, directed to be taken and expropriated in order to enlarge the "Island Park," but no general plan or scheme for park improvements was considered till 1901, when a special committee was appointed to elaborate a plan. The defendant corporation from 1880 till 1901 acted on the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rent and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners. The park scheme was not abandoned, but the details and the area were modified from time to time by successive councils:—

*Held*, that the corporation had not exceeded their powers in so dealing with the land designated. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee, and the fact of corporate action

being embodied in a by-law implies its revocability.

*Held*, also, that a person who was joined as a plaintiff, claiming under a lease made prior to the park scheme, and renewed in 1895, after registration of plans made in 1883 and 1890, which shewed that the corporation had sanctioned the subdivision of the lands in question into building lots, had not such an interest, by reason of a special grievance, as would entitle her to have the corporation restrained from granting to one of the defendants a building lease of part of the lands in question. *Attorney-General et al. v. City of Toronto et al.*, 159.

4. *Liability for Nursance—  
Discharging Hot Water down  
Sewers into Navigable Waters  
—Vessels Moored for Winter—  
Special Damage.*]

The defendants' sewer emptied into navigable water at the end of one of their streets, in which water the plaintiff's vessel was lawfully moored for the winter. The defendants, although notified of similar consequences having previously happened, allowed a factory to send hot water down the sewer, which melted the ice on the easterly side of the vessel, causing her to fall away on that side, so that the oakum packing in her seams, remaining frozen to the ice on the west side was torn away, the seams opened, and water was let in, whence damage resulted:—

*Held*, that the defendants were liable, as the plaintiffs

were lawfully using the waters, and the discharge of the hot water was, under the circumstances, a public nuisance; and the plaintiff having suffered special damage therefrom, was entitled to recover against the defendants. *Mathews v. Corporation of Hamilton*, 198.

5. *Contract to Construct Sewers—Interference by Reason of Other Sewers — Liability of Municipality.*—The plaintiff contracted with the defendants to construct certain sewers. In the course of his work the contents of other sewers of the defendants, the existence of which had not been disclosed to him, but which had to be displaced to enable him to complete his work, flowed into the trenches dug by him, and impeded him, and caused him additional expense:—

*Held*, that the plaintiff was entitled to recover from the defendants the loss thus sustained, for the defendants had broken the duty they owed to him, to do nothing to prevent or interfere with his doing the work he had contracted to do. *Bourque v. Corporation of Ottawa*, 287.

6. *Debentures—Defective By-law—Remedial Enactment*—3 *Edw. 7, ch. 18, sec. 93.*—A municipal by-law made in 1892, on which debentures were issued, provided for payment of the interest, but failed to provide for payment of the principal. All interest on the debentures was duly paid, but not the principal,

though that too had fallen due. 3 *Edw. 7, ch. 18, sec. 93 (O.)*, enacts that “where in the case of any by-law heretofore or hereafter passed, the interest for one year or more on the debentures issued under such by-law and the principal for the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding”:—

*Held*, that the effect of this is to make one payment of interest validate the debenture in respect of which it is paid, and one payment of principal validate the series in respect to which it is paid, and that accordingly the debentures in question were validated. *Standard Life Assurance Co. v. Tweed*, 653.

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## NAVIGABLE WATERS.

*Committing Nuisance in.*—*See* MUNICIPAL CORPORATIONS, 4.

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## NECESSARIES.

*See* CRIMINAL LAW, 4.

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## NEGLIGENCE.

1. *Evidence—Workman's Death Without Witnesses—New Trial.*—Plaintiff's son and another labourer were directed to clear up and remove the rubbish, caused by their cutting a trench in the concrete floor of an alley-way in the defendants'

power house. The alley-way was crossed at right angles by others, and on each side of the former were electric machines and live wires within arm's length of any one working in the trench. The other labourer went into a cross alley-way where the live wires were, although a slat had been nailed across it when they were both put to work, and was sweeping towards the trench the litter that had been scattered about, when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switch-board, plaintiff's son being dead. It was shewn there was a rupture in the insulation of a loose loop or cable hanging from the switch-board directly over where the survivor was lying, and that the insulation of the wires was, with respect of the voltage passing, insufficient for the safety of any one working among them; and that the hanging loop might easily have been better guarded than it was:—

*Held*, that there was evidence which could not be properly withdrawn from the jury and a new trial was ordered. *Griffiths v. Hamilton Electric Light and Cataract Power Co.*, 296.

2. *Material Alteration in Note—Liability of Branch Manager of Bank—Disobeying Instructions.*]—The defendant, a branch manager of the plaintiffs' accepted a joint instead of a joint and several promissory notes as security for an advance, although

expressly instructed to require the latter. On discovering the mistake, he inserted the words "jointly and severally" in the belief that this alteration was to be initialled by all the makers, which, however, was not done. After consulting the bank's solicitor, the defendant crossed out the inserted words. In the result the plaintiffs were held to have lost their remedy on the note on the ground of material alteration, and brought this action against the defendant for damages:—

*Held*, that since the note as taken was to all intents and purposes as valid as if made jointly and severally, only nominal damages were recoverable against defendant for his breach of duty in this regard.

*Held*, also (Osler, J.A., dissenting) that the defendant was not liable for the result of his subsequent acts, since he acted in good faith, and in ignorance of the legal consequences, and had exercised reasonable care and diligence under all the circumstances, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable. *La Banque Provinciale v. Charbonneau*, 302.

3. *Accident—Live Electric Wire—Contact with—Trespasser on Pole—Privity of Contract—Contributory Negligence.*]—The defendants, electrical engineers, had contracted to illuminate certain buildings,



and for such purpose had arranged with an electric company for the supply of electric current. To enable such current to be transmitted, the defendants had strung wires on an existing telegraph pole, belonging to another company, their wires being some distance below the other wires, and fastened to glass insulators with tie wire, the ends of which were some two or three inches long unprotected by insulating covering. The plaintiff and two other employees of the electric company were engaged in putting up for the company, on the same pole but without any license or authority from the owner, an electric transformer for the transmission of electricity to adjacent premises, as to which the defendants were in no way interested, and while working on the pole the plaintiff's hands came into contact with one of the ends of the tie wire, which, by reason of the absence of insulating covering, had become a live wire, whereby the plaintiff received a shock and fell to the ground and was injured. The plaintiff knew the dangerous character of the work and the likelihood of there being live wires, and that the rule of his employers in such cases was that rubber gloves should be worn by him:—

*Held*, that no negligence on the defendants' part was proved, for no duty was cast upon them with regard to the plaintiff, who was not their employee, and the work which was being

done was not on their behalf; and that even if negligence on the defendants' part could be assumed, the plaintiff was guilty of such contributory negligence as would preclude his recovering. *Randall v. Ottawa Electric Co.*, 619.

See PRINCIPAL AND AGENT—TRUSTS AND TRUSTEES, 3 — WILL, 2.

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### NEW TRIAL.

See CRIMINAL LAW, 1—NEG-  
LIGENCE, 1 — PLEADING, 2 —  
PRACTICE, 5.

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### NEXT OF KIN.

See DEVOLUTION OF ESTATES  
ACT, 3.

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### NOTICE.

*Of Payment into Court.*—  
See COSTS, 1.

*Actual.*—See INDIAN LANDS.

*Of Cancelling Policy.*—See  
INSURANCE, 3.

*Bona fide Purchaser for  
Value.*—See LAND TITLES ACT  
—REGISTRY LAWS, 1.

See CHOSE IN ACTION, 1 —  
PARLIAMENT.

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### NUISANCE.

See MUNICIPAL CORPORA-  
TIONS, 4.



**OFFICIAL GUARDIAN.**

See DEVOLUTION OF ESTATES,

1.

**ORDER.**

*Interlocutory.*—See APPEAL.

**PARKS.**

*Establishment of.*—See MUNICIPAL CORPORATIONS, 3.

**PARLIAMENT.**

1. *Controverted Elections — Disagreement of Trial Judges on Charge of Corruption — Right of Appeal*—The Ontario Elections Act R.S.O. 1897, ch. 9—The Controverted Elections Act R.S.O. 1897, ch. 11.]—The judges at the trial of an election petition having reserved judgment in respect of five charges, subsequently dismissed four of them, both Judges agreeing as to the result. As to the fifth charge—payment of money by the candidate to a voter to induce the latter to vote for him—the Judges disagreed; one being in favour of the dismissal of the charge; the other being of opinion that the charge was proved.

On appeal to the Court of Appeal:—

*Held*, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal.

*Held*, also, that the provisions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Elections Act which are in *pari materiâ*; and that there is no right of appeal to the Court of Appeal in respect of a charge of corrupt practices where the two Judges who try the charge fail to agree.

MACLAREN, J.A., dissenting. *Re Lennox Provincial Election. Perry v. Carscallen*, 203.

2. *Practice—Presentation of Petition—Copy for Returning Officer — Omission — Default Under Rule 1 (2)—Extension of Time—Rule 58.*—Election petitions filed with local registrars under 62 Vict. (2nd sess.) ch. 6 (O.) are received by them as registrars of the Court of Appeal.

Although a petitioner who does not leave with the local registrar a copy of the petition at the time of filing the petition to be sent to the returning officer is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And where through inadvertence the solicitor for a petitioner had omitted to leave the copy and applied without delay, the time was extended,

and an order for the dismissal of the petition was discharged.

Judgment of Maclellan, J.A., reversed. *Re North Grey Election. Boyd v. MacKay*, 273.

3. *Parliamentary Elections—Controverted Election Petition—Application to Fix Day for Trial—Delay—Extending Time for Trial—Grounds for Discretion—Appeal—Form of Order.*]—The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from the 10th March to the 27th June. On the 5th November applications were made by the petitioners to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the Judge was unable to fix dates, and, the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained, orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the Court would fix days for trial suitable to the Judge's other engagements; that bribery was extensively practised on behalf of

the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were made *bona fide* and not for delay:—

*Held*, that the applications to the rota Judge were in time to enable the trials to be commenced within six months from the date of the presentation of the petitions (excluding the time occupied by the session), within the meaning of secs. 47 and 48 of the Ontario Controverted Elections Act; and the failure to fix days could not be attributed to the petitioners: secs. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of the days in the hands of the rota Judges.

It was not open to the respondents to complain of lack of diligence by the petitioners within the six months, no days for trial having been fixed.

Much of what was necessary to be shewn on the applications to extend the time, transpired in the presence of the Judge, and the facts were within his own knowledge; there was no reason why he should not act upon that knowledge in considering the applications.

And, having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders; the Judge rightly exercised his discretion upon sufficient grounds and for sufficient rea-

sons appearing before him, and his orders should not be interfered with.

The appropriate form of the orders would be to extend the time for fixing the days of trial, rather than the time for the commencement of the trial. *Re North Perth Provincial Election. Monteith v. Brown. Re North Norfolk Provincial Election. Snider v. Little*, 597.

4. *Voters' Lists — Notice to Strike off Names—Non-compliance with Form—Amendment.*] It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, R.S.O. 1897, ch. 7, for objections to the names wrongfully inserted on the Voters' Lists should be followed with exactness, all that is required being that the nature of the objections to the names should be stated with reasonable clearness.

Where, therefore, in giving notice of the wrong insertion of names placed on the Voters' List, the complainant used list No. 2 of form 6 in the schedule, being the list\* for persons wrongly named, instead of list No. 3, being the list of those wrongly inserted on the Voters' List, but it was quite apparent what the grounds of the objections were, the notice was held sufficient.

An amendment in such case might be made if necessary. *Re Voters' Lists, Township of Rawdon, North Hastings*, 631.

5. *Parliamentary Elections — Controverted Election Peti-*

*tion—Examination of Respondent for Discovery—Inquiry into Corrupt Practices Committed at Former Election—Scope of — Lengthy Examination — Discretion — Adjournment — Continuation.*]—Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question.

Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion was alleged to have been renewed at the election in question:—

*Held*, that the question should be answered.

If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.

Where the examination was continued until late at night, when the examiner became ex-



hausted and was unable to proceed further with it:—

*Held*, that the respondent must attend for further examination. *Re North York Provincial Election. Kennedy v. Davis*, 714.

### PARTIES.

1. *Representation—Con. Rule 200.*]—The plaintiff sought an injunction against a musical protective association restraining them from making a member of that body break a contract which he had entered into with the plaintiff, to supply an orchestra to the latter's theatre; and made the president and six other officers or leading members of the Association defendants, as representing the Association:—

*Held*, that under Rule 200 the plaintiff was entitled to an order that the said defendants might be sued and authorized to defend on behalf of all the members of the Association. *Small v. Hyttenrauch, et al. Cresswell v. Hyttenrauch, et al.*, 388.

2. *Unincorporated Association—Salvation Army.*]—The Salvation Army is an unincorporated religious society, and an action cannot be maintained against it for torts committed by its officers.

The judgment in this action on the motion to set aside the writ, reported 5 O. L. R. 585, considered and not followed.

*Kingston v. Salvation Army*, 406.

3. *Joinder—Several Torts.*]—Claims against two or more defendants in respect of their liability for several torts cannot be joined in the same action. Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the same period as its agent, the plaintiffs were ordered to elect as against which defendant they would proceed, and the action was dismissed with costs as against the other. *Appleton v. Fuller*, 683.

See PRACTICE, 4, 9.

### PARTITION.

See REGISTRY LAWS, 1.

### PARTNERSHIP.

*Foreign Judgment Against Corporation—Action on, Against Partnership—Recovery of Judgment—Estoppel—Service—Execution Against Partners—Rule 228—Issue.*]—A judgment was recovered in an action for libel by the plaintiff in a Superior Court of the Province of Quebec against certain defendants sued and described as "La Compagnie de Publication Le



Temps, a body politic and corporate, having its principal office and place of business in the city of Ottawa, in the Province of Ontario." There was no incorporated company in Ontario of that name, but a partnership firm of that name was registered in Ottawa, the partners being F. M. and his wife. This action was begun in Ontario by a writ specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F. V. M., the manager of Le Temps Publishing Company, but without the notice in writing required by Rule 224 informing him in what capacity he was served. Le Temps Publishing Company appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F. M. as "one of the registered partners of the defendants, otherwise called La Compagnie de Publication Le Temps." Upon a motion by the plaintiff for leave to issue execution against F. M. and his wife as members of the defendant partnership, an issue was directed to be tried to determine whether they were members of the partnership and liable to have execution issued against them:—

*Held*, that it must be taken that the judgment in this jurisdiction was recovered against a partnership firm, and not against a corporation. If the Quebec judgment was to be regarded as

one against a corporation, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn, but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an unimpeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F. M. and his wife as members of the firm; and, as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed. *Gibson v. Le Temps Publishing Co.*, 690.

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### PATENT.

*See* TRADE MARK.

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### PAYMENT.

*By Executor de son Tort.*—  
*See* EXECUTORS AND ADMINISTRATORS, 2.

**PENALTY.**

*Action for.*—See EVIDENCE, 1.

See CONSTITUTIONAL LAW, 3  
—JUSTICE OF THE PEACE—  
MUNICIPAL CORPORATIONS, 2.

**PERPETUITIES.**

See WILL, 3.

**PERSONAL EFFECTS.**

See WILL, 7.

**PERSONATION.**

*Of Voter.*—See CRIMINAL  
LAW, 3—MANDAMUS.

**PETITION.**

*Election.*—See PARLIAMENT,  
2, 5.

*Evidence on.*—See REGISTRY  
LAWS, 2.

**PLAN.**

*Amendment of.*—See REG-  
ISTRY LAWS, 2.

**PLEADING.**

1. *Statement of Claim—Ac-  
tion for Damages—Dangerous  
Machine—Insurance Agent—  
Striking out Allegation.*—In  
an action for damages caused by  
a defect in a machine belonging  
to the defendants, an allegation

in the statement of claim that  
the defendants were insured in  
an insurance company against  
such accidents, was struck out  
as immaterial, and as embar-  
rassing to the defendants. *Flynn  
v. Industrial Exhibition Asso-  
ciation of Toronto*, 635.

2. *Amendment of, After  
New Trial Ordered—Allegation  
of Special Damage.*—All neces-  
sary amendments may be made  
at any time, and an action, in  
which a non-suit has been set  
aside as against one defendant  
and a new trial ordered, as to  
him, by a Divisional Court, is in  
the same position as if it was at  
issue and had not been tried;  
and the plaintiff may be allowed  
to amend the statement of claim  
by inserting a paragraph clam-  
ing special damages.

*Duke of Buccleugh*, [1892]  
P.D. 201 specially referred to.

*Semble*, that while it may be  
convenient to submit a draft  
amendment it is not necessary  
so to do. *Hunter v. Boyd*, 639

3. *Statement of Claim—Deliv-  
ery after Defence—Irregu-  
larity.*—The defendant entered  
an appearance, and at the same  
time filed a statement of defence  
and counterclaim, which he then  
served, and gave notice to  
the plaintiffs that he did not  
require the delivery of a state-  
ment of claim:—

*Held*, that a statement of  
claim subsequently delivered by  
the plaintiffs was irregular.  
The indorsement on the writ of  
summons had become the state-  
ment of claim, and, if not suf-

ficient could be amended without leave.

Rules 171, 243, 247, 256, 300, considered. *Confederation Life Association v. Moore*, 648.

*Noting.*—See COSTS, 1.

See JUSTICE OF THE PEACE.

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## POLICE MAGISTRATE.

See MANDAMUS.

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## PORT.

*Regulations of.*—See SHIP.

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## POSSESSION.

*Writ of.*—See LANDLORD AND TENANT, 2.

*By Railway.*—See RAILWAYS, 3.

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## PRACTICE.

1. *Writ of Summons—Service—Substitutional Service—Solicitor.*—After instructions to a solicitor to accept service of a writ of summons had been revoked, an order was obtained by the plaintiff for substitutional service of the writ upon him:—

*Held*, that the solicitor had no *locus standi* to move to set aside the order.

An error in the report of *Young v. Dominion Construction Co.* (1900), 19 PR 139, pointed out.—*Taylor v. Taylor*, 356.

2. *Writ of Summons Address of Defendant—Foreign Defendant.*—The address of the defendant is a necessary part of the writ of summons and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was, on his application, set aside with costs. *State Savings Bank v. Columbia Iron Works*, 358.

3. *Report on Sale—No Sale for Want of Bidders—Confirmation—Appeal—Order of Foreclosure.*—A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from and requires confirmation.

And an order made by a local Judge confirming such a report, while it was neither confirmed under Con. Rule 769 nor appealed from and granting foreclosure in default of payment, was held to be bad. *Robert v. Caughell*, 381.

4. *Jurisdiction—Service Out of—Parties—Injunction—Con. Rule 162.*—An order allowing service of a writ out of the jurisdiction cannot be supported under clause (f) of Con. Rule 162 unless the injunction can be properly asked as against the defendant out of the jurisdiction sought to be served.

In proceedings under clause (g) of Con. Rule 162, the defen-

dant within the jurisdiction should be served with the writ and then an order applied for for leave to serve the defendant resident out of the jurisdiction with a concurrent writ, and failure to proceed in this way is not such an irregularity merely as can be condoned.

*Collins v. North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228, followed. *Livingstone v. Sibbald* (1893), 15 P.R. 315; *McKay v. Colonial Investment and Loan Co.* (1902), 4 O.L.R. 571, and *Re Jones v. Bissonnette* (1902), 3 O.L.R. 54, considered. *Postlethwaite v. McWhinney*, 412.

5. *Motion for New Trial—Examination on Pending Motion—Admissibility of Evidence—Witnesses at Trial—Con. Rule 491.*—Evidence of persons who had been witnesses at a trial, that the evidence they then gave was not true, and that certain statements made by them before trial to the plaintiff's solicitor were true, is not receivable on a motion for a new trial.

*Per* STREET, J., Rule 491, as to examining witnesses on pending motions, applies to motions for a new trial before a Divisional Court.

*Per* STREET, J., also, The Master in Chambers has no power to refer a matter before him to the Divisional Court. *Rushton v. Grand Trunk R. W. Co.*, 425.

6. *Writ of Summons—Substitutional Service—Motion to*

*Set Aside—Status of Applicant—Solicitor.*]—Where a solicitor who was served with the writ of summons for the defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service:—

*Held*, that he had no *locus standi*.

The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.

*Semble*, that if the solicitor were not acting for or in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent.

Decision of the Master in Chambers, *ante* 356, affirmed on different grounds. *Taylor v. Taylor*, 545.

7. *Writ of Summons—Service out of Jurisdiction—Sale of Goods—Breach of Contract—Place of Performance—Property Passing—Order for Service—Affidavit—Non-disclosure—Discretion as to Forum.*]—The defendants lived in England. One of them, being in Ontario, saw the plaintiffs who lived in Ontario, and it was agreed that the plaintiffs should



send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, *via* Leyland Line from Boston, delivered f.o.b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the goods shipped in the same way. Before this order was filled the defendants were sued in England for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned:—

*Held*, that the property in the goods passed to the purchasers on the delivery on board the vessel at Boston, and that an action would thereupon lie in Ontario, which was the place for payment, for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in case of sale by sample, *prima facie* the place of delivery is the place of inspection, and there was nothing in the contract to rebut the presumption.

Therefore the action came within Rule 162 (1) (e), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed.

*Held*, also, that it was not necessary for the plaintiffs, in obtaining an *ex parte* order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods and returned them to the plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained.

*Held*, lastly, that a proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England.

*Lopez v. Chavarri*, [1901] W. N. 115, distinguished. *Atkinson et al. v. Plimpton et al.*, 566.

8. *Motion to set aside order for service out of Jurisdiction — Stay of proceedings — Appearance.*—A notice of motion to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings, until finally disposed of, so that the time to enter an appearance does not run in the meanwhile. *Confederation Life Association v. Moore*, 603.

9. *Joinder of Defendants — Rules 186, 187 — Separate Causes of Action.*—Different defendants cannot be brought before the Court in the same action where the real causes of

action that exist against them are separate.

In this case the plaintiff sued for the obstruction of a water course which passed through her property, causing it to be overflowed, and charged that the natural effect of the concurrent acts of the defendants, separate property owners, was to cause the water to become obstructed and to overflow the plaintiff's land, but without alleging that these acts were done in concert, or that the defendants were jointly concerned in their commission:—

*Held*, that the plaintiff must elect against which of the two defendants she would continue the action. *Hinds v. Corporation of Barrie*, 656.

10. *Writ of Summons—Renewal—Statute of Limitations—Ex Parte Order—Master in Chambers—Local Judge.*—The Master in Chambers has jurisdiction to rescind an order made on the *ex parte* application of the plaintiff by a local Judge for the renewal of a writ of summons, if material evidence has, even unintentionally, been withheld.

Such an order was rescinded where on the *ex parte* application the facts that the writ had expired and that the Statute of Limitations had run as against the claim, were not brought to the notice of the local Judge. *Williams v Harrison*, 685.

See COSTS, 2—PARLIAMENT, 2.

## PRINCIPAL AND AGENT.

*Negligence—Fire Insurance—Agent's Liability—Gratuitous Undertaking—Mandate.*—The defendant, a general insurance agent, gratuitously undertook to have an additional policy placed on the plaintiff's property, and also to notify the companies already holding policies of this additional insurance. A loss occurred, and, owing to defendant having neglected to give the notice, the plaintiffs had to compromise their claim at \$1,000 less than they otherwise would have recovered:—

*Held*, that the defendant having undertaken, though gratuitously, to perform the business, and having actually entered on the execution of it, was liable for the negligence which had caused loss to the plaintiffs.

*Coggs v. Bernard* (1703), 2 Ld. Raym. 909, specially considered. *Baxter & Co. v. Jones*, 360.

See INSURANCE, 6.

## PRINCIPAL AND SURETY.

1. *Guarantee—Construction of—Future Indebtedness.*—A firm being indebted to the plaintiffs for goods supplied, on ordering further goods received from plaintiffs the following telegram: "Let M. L.," the defendant "wire guarantee for payment of all accounts to us, and everything will be satisfactory," to which the defendant, without apparently

having seen the telegram, but having been informed of its contents, telegraphed in reply, "will guarantee payment of all accounts" for the firm:—

*Held*, that the guarantee was a continuing one and that defendant was liable for accounts incurred or to be incurred. *St. Lawrence Steel and Wire Co. v. Leys*, 235.

2. *Assignment of Mortgage—Covenant of Assignor for Payment of Mortgage—Discharge of Part of Land Mortgage—Release of Assignor.*—The defendant when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt:—

*Held*, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not. *Farmers Loan and Savings Co. v. Patchett*, 255.

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### PRIORITY.

See INDIAN LANDS—REGISTRY LAWS, 1.

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### PRIVATE PROSECUTOR.

*Right to Conduct Proceedings.*—See CRIMINAL LAW, 5.

### PRIVILEGED COMMUNICATION.

See WILL, 5.

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### PROBATE.

See WILL, 5.

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### PROCEDURE.

See EVIDENCE, 1.

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### PROHIBITION.

See LANDLORD AND TENANT, 2.

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### PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

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### PROVINCIAL LEGISLATURE.

*Delegation of Powers of.*—See CONSTITUTIONAL LAW, 3.

See EXECUTORS AND ADMINISTRATORS.

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### PUBLIC PROPERTY.

See CONSTITUTIONAL LAW, 1.

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### PUBLIC SCHOOLS.

See SCHOOLS.

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### PURCHASER.

See DOWER, 2—LAND TITLES ACT—VENDOR AND PURCHASER.

## RAILWAY.

1. *Bonds — Mortgage — Default in Payment — Sale of Railway — Validity*—46 Vict. ch. 24, secs. 14, 15, 16 (D.).]—A railway incorporated by Provincial legislation, and which is afterwards declared to be a work for “the general advantage of Canada,” can be validly sold as a going concern, where the sale is under the provisions of a mortgage, or at the instance of holders of bonds secured by a mortgage on the railway, or under any other lawful proceeding.

Bonds of the railway were issued, and as security for their payment a mortgage of the railway was made to a trust company, containing a provision that in default in payment of the principal of the bonds, and on request of three-fourths of the bondholders, the trustee should immediately elect and declare the bonds to be due and payable and take proceedings for enforcing payment:—

*Held*, that the Act 46 Vict. ch. 24, secs. 14, 15, 16 (D.) (re-enacted by the present Railway Act, 51 Vict. ch. 29, sec. 278), although passed subsequently to the date of the mortgage, applied, and that a sale of the railway could be validly made.

*Peto v. Welland R. W. Co.* (1862), 9 Gr. 455, and *Galt v. Erie R. W. Co.* (1868), 14 Gr. 499, distinguished.

A consent judgment directing a sale of the railway was, under

the circumstances of the case, vacated, and the defendants allowed to come in and defend. *Toronto General Trusts Corporation v. Central Ontario R.W. Co.*; *Ritchie v. Blackstock et al.*; *Central Ontario R.W. Co. v. Blackstock et al.*, 1.

2. *Farm Crossing — Approaches — Repair.*]—Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto within the farm. *Palmer v. Michigan Central R.W. Co.*, 90.

3. *Agreement to Purchase Land — Taking Possession — Non-payment of Purchase Money — Landowner's Remedy — Arbitration — Action — Expected Profits — Measure of Damages*—63 Vict. ch. 77 (O.)—51 Vict. ch. 29, sec. 131 (D.).]—In carrying out the agreement provided for in 63 Vict. ch. 77 (O), an Act respecting the Town of Meaford, the town agreed with the plaintiff for the purchase of and possession by the railway company of the portion of the plaintiff's land required by the company, but without fixing the price.

The company, pursuant to sec. 131 of “The Railway Act,” 51 Vict. ch. 29 (D.), deposited a plan, profile and book of reference of the land required in the county registry office, which was approved by the Railway Committee, shewing the plain-



tiff's lands entered upon it, and completed the work.

The purchase money not having been agreed upon, or paid, plaintiff brought an action against the town and the railway company for damages to the land, and for interference with his business, whereupon the town paid into Court \$375.50, and set up, by way of defence, that plaintiff's remedy was by arbitration under the Municipal Act:—

*Held*, that the defendants, the town, were not liable, and that the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action, and that the money in Court should be paid out to him without prejudice to his right to proceed further against the company.

Judgment of Falconbridge, C.J., varied. *Todd v. Corporation of Meaford*, 469.

4. *Mortgage on Undertaking—Bonds—Interest Coupons—Arrears—Real Property Limitation Act.*]—The restrictions placed upon the right to recover arrears of interest charged upon land imposed by secs. 17 and 24 of the Real Property Limitation Act, R. S. O. 1897, ch. 133, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds, which are secured by mortgage deeds of trust. The coupons are in effect documents under seal—the bond under seal containing a covenant for pay-

ment of the coupons—and they, therefore, partake of the nature of a specialty, and are good for at least twenty years. *Toronto General Trusts Corporation v. Central Ontario R.W. Co. et al.*, 534.

5. *Carriage of Goods—Liability for Loss—Dog—Common Carriers.*]—The defendants are, by the Railway Act, 51 Vict. ch. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him.

Distinction between the English and Canadian Railway Acts pointed out.

Judgment of the county court of Wentworth affirmed. *McCormack v. Grand Trunk R.W. Co.*, 577.

*Abandonment of Proceedings.*]—See COSTS, 4.

## REAL PROPERTY LIMITATION ACT.

See RAILWAYS, 4.

## REAL ESTATE.

*Payment Out of.*]—See WILL, 8.

## RECEIVER.

*Equitable Execution—Judicature Act, sec. 58, sub-sec. 9—Property to be Reached—Book*

*Debts—Shares in Foreign Company — Insurance Policy.*]—The provision in sec. 58, sub-sec. 9, of the Judicature Act, R.S.O. 1897, ch. 51, that a receiver may be appointed in all cases in which it shall appear to be just or convenient that such order should be made, was intended merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone:—

*Held*, that a judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another, assigned to the debtor. *Re Asselin and Cleghorn*, 170.

### REGISTRY LAWS.

1. *Certificate of Allowance of Petition Under Partition Act—Lien of Execution Creditor—Expiry of Writ—Preservation of Lien—Notice—Boná Fide Purchaser for Value—Priorities.*]—In proceedings for partition under the Partition Act by a tenant in common, the fact that a judgment creditor having a fi. fa. against the lands of another tenant in common in the hands of the sheriff is made a party respondent to the peti-

tion and that an order allowing the petition has been made and a certificate thereof registered is not sufficient to preserve a lien on the debtor's undivided share, the fi. fa. having in the meantime expired before some Act or declaration of the Court had recognized his claim as an existing one against the lands.

\* The allowance of a petition has not the force of a judgment or order establishing the claims of any of the parties.

At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a *boná fide* purchaser for value:—

*Held*, that the company's lien was not preserved by the proceedings taken before the conveyance to G., and that she was not affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands. *Macdonell v. Best et al.*, 18.

2. *Amendment of Registered Plan—Petition to County Court Judge—Jurisdiction of Judge of Another County—Local Courts Act—Evidence on Petition—Affidavits—Merits—Order Refusing to Re-Open—Appeal.*]—A petition under sec. 110 of the Registry Act, R.S.O. 1897, ch. 136, for an order amending a plan of land in a town by closing part of a street allowance, presented to the Judge of the county court of the county in which the land lay, was at his request heard and adjudicated upon by the Judge of another county:—

*Held*, that the Judge of another county court has jurisdiction, upon the request of the Judge of the county court of the county in which the land lies, to hear and adjudicate upon such a petition. To hear such a petition is one of the judicial duties to be performed by the Judge of a county court in any case where application is made to him instead of to a Judge of the High Court; and secs. 16 and 18 of the Local Courts Act, R.S.O. 1897, ch. 54, apply.

2. Although the application to amend the plan is by petition and is, therefore, interlocutory in form, the order to be made finally and conclusively settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, be given *viva voce*. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses

given in support of the petition.

3. Upon the merits the order of the Judge amending the plan was justified, the portion of the street in question never having been opened or used as a highway, and the lands abutting on both sides being owned by the petitioner.

4. No appeal lay to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence.

Order of Judge of county court of Oxford affirmed. *Re McDonald and Town of Listowel*, 556.

*See* INDIAN LANDS—VENDOR AND PURCHASER, 1.

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## RELATIVES.

*Implied Right to Remuneration.*]—*See* CONTRACT, 2.

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## RELEASE.

*See* EXECUTION.

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## RETURNING OFFICER.

*See* PARLIAMENT, 2.

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## RULES.

*Con. Rule 138.*]—*See* JUDGMENT, 1.

*Con. Rule 162.*]—*See* PRACTICE, 4.

*Con. Rule 162 (f) (g).*]—*See* PRACTICE, 6.

*Con. Rule 171.*]—See PLEADING, 3.

*Con. Rule 186.*]—See PRACTICE, 9.

*Con. Rule 187.*]—See PRACTICE, 9.

*Con. Rule 200.*]—See PARTIES, 1.

*Con. Rule 224.*]—See PARTNERSHIP.

*Con. Rule 228, Part (2).*]—See PARTNERSHIP.

*Con. Rule 243.*]—See PLEADING, 3.

*Con. Rule 247.*]—See PLEADING, 3.

*Con. Rule 256.*]—See PLEADING, 3.

*Con. Rule 300.*]—See PLEADING, 3.

*Con. Rule 346.*]—See COSTS, 1.

*Con. Rule 358.*]—See COMPANY, 1.

*Con. Rule 491.*]—See BANKRUPTCY AND INSOLVENCY, 1.

*Con. Rule 529 (b).*]—See VENUE, 1.

*Con. Rule 603.*]—See JUDGMENT, 1, 2.

*Con. Rule 625 sub-sec. 2.*]—See APPEAL.

*Con. Rule 666.*]—See INTEREST.

*Con. Rule 667.*]—See INTEREST.

*Con. Rule 826.*]—See COSTS, 5.

*Con. Rule 827.*]—See COSTS, 5.

*Con. Rule 830.*]—See COSTS, 5.

*Con. Rule 1190.*]—See SHERIFF.

*Con. Rule 1192.*]—See SHERIFF.

*Con. Rule 1198 (a).*]—See COSTS, 3.

*Con. Rule 1204.*]—See COSTS, 1.

*Con. Rule 1207.*]—See COSTS, 1.

*Election Rule 1 (2).*]—See PARLIAMENT, 2.

*Election Rule 26.*]—See PARLIAMENT, 3.

*Election Rule 27.*]—See PARLIAMENT, 3.

*Election Rule 58.*]—See PARLIAMENT, 2.

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### SALE.

*Report on.*]—See PRACTICE, 2.

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### SALE OF GOODS.

*Warranty — Correspondence — Construction — Breach — Damages.*]—The plaintiff, a private banker, wrote to the defendants, safe makers: "Can you give me a rough estimate of what a burglar proof door with proper frame complete will cost?" The defendants answered: "We can build you a burglar proof door of any size and description you wish. The cheapest door we now make is \$250 . . . our No. 67, the outer door being 1½ inches thick, the entire surface protected with hardened drill proof



plate. . . Next better quality of door to this is one  $1\frac{1}{2}$  inches thick, at \$400, and the next at \$550." They enclosed cuts of three vault doors, Nos. 67, 68, and 69; the two latter were called "fire and burglar proof vault doors;" No. 67 was called "fire proof vault door with chilled steel lining;" and the printed note below the cut read, "The above cut represents our vault doors suitable for post offices, court houses, insurance offices, etc., and are made with a lining of chilled steel covering the entire surface of outer door." The plaintiff replied: "Would No. 67 furnish a fair protection against burglars?" The defendants telegraphed: "No. 67 gives both fire and burglar proof protection." The plaintiff then ordered a No. 67 door, which was supplied to him and put into use. Shortly afterwards it was blown open by burglars, and this action was brought to recover damages for breach of warranty. It appeared from the evidence that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave easy entrance to further explosives by which the door was wrecked. The door having been taken to pieces during the trial, it was found that the centre layer of the three layers making up the door, which was

represented to be hardened drill proof plate, was neither hardened nor drill proof, and was easily perforated by an ordinary hand drill in a minute and a half:—

*Held*, that the correspondence could not be construed as containing an absolute warranty on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time or place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safe makers could make them. Both warranties had been broken.

*Held*, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of those defects was not the reason why the burglars were able to break it open; but the plaintiff, having sustained a total loss by reason of the article supplied being valueless, was entitled to recover as dam-

ages the price, \$250. *Denison v. Taylor et al.*, 93.

*Breach of Contract for.*]—See PRACTICE, 6.

See JUDGMENT, 2.

### SALE OF LAND.

*Fraudulent Transfer.*]—See LAND TITLES ACT.

*Purchase of School Site, Title to Land.*]—See SCHOOLS, 2.

See INDIAN LANDS — PRACTICE, 3 — VENDOR AND PURCHASER, 1, 2.

### SALVATION ARMY.

See PARTIES, 2.

### SECURITY FOR COSTS.

See COSTS, 1, 2, 3, 5.

### SENTENCE.

See CONSTITUTIONAL LAW, 3.

### SERVICE.

*Of Writ of Summons.*]—See PRACTICE, 1, 5.

### SEWERS.

See MUNICIPAL CORPORATIONS, 4, 5.

### SCHOOLS.

1. *Public Schools* — *Alteration of School Sections*—*Appeal from Township Council* — *Powers of Arbitrators*—*By-law Altering School Sections* — *Description of Lots.*]—The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of ratepayers, have power only to grant or refuse what is asked for in the petition, and have no power to direct the formation of a section different from that asked for in the petition.

*Re Southwold School Sections* (1902), 3 O. L. R. 81, applied.

In by-laws altering existing school sections or adding territory to them, the lots and parts of lots dealt with must be accurately and exactly described. *Re Sydenham School Sections*, 417.

2. *Public Schools*—*Purchase of Site and Erection of Building*—*Funds Provided by Council*—*Proceeds of Old Site and Building*—*Title to Land*—*Expropriation* — *Agreement with Tenant for Life.*]—Although, as decided in *Smith v. Fort William Public School Board* (1893), 24 O.R. 366, public school trustees should not undertake for building purposes an outlay in excess of funds provided by the council, they are not restricted to the debentures voted by the council under sec. 76 of the Public Schools

Act, 1901, but may also use other moneys they have under control in the shape of proceeds of the old school house and site, etc.

The Court should not lightly obstruct the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality.

An agreement for purchase and possession of a new site made by a school board with the tenant for life is one that controls the remaindermen under sec. 39 of the Act.

*Midland R.W. Co. v. Young* (1893), 22 S.C.R. 190, followed. *Forbes v. Grimsby Public School Board et al.*, 539.

3. *Public Schools—Selection of Site — Arbitration and Award.*]—Under sec. 34 of the Public Schools Act, 1 Edw. VII. ch. 39 (O.), the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing (from the trustees) as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site. *Re Sombra Public School Section No. 26*, 585.

#### SHERIFF.

1. *Fees of — Poundage — Money Paid before Sale — Possession Money—Con. Rules 1190, 1192.*]—Where a sheriff

made a seizure under writs of *feri facias* of personal property of the judgment debtor; and a few hours before the sale, the judgment debtor came to him and paid the judgment debts in full:—

*Held*, that the sheriff was entitled to poundage on the full amount of the judgment debts, and not merely on the value of the property seized.

*Held*, also, that under the circumstances of this case \$2.25 per day was not too much to allow for possession money. *Re Black Eagle Gold Mining Co.*, 512.

See LANDLORD AND TENANT, 2.

#### SHIP.

*Charter—Place of Loading—Regulations of Port—Duty of Charterer—Duty of Ship-owner — Breach — Damages.*]—The plaintiffs being the owners of a steam vessel, called the *Midland Queen*, agreed by telegram with the defendants to carry a cargo of wheat from F. W. to G. at four and a half cents a bushel as follows: "We confirm *Midland Queen* four and a half, load F. W. on or before noon fifth December." The wheat was in the elevators of a railway company at F. W. and the vessel arrived in that harbour on the 3rd December. Several other vessels had arrived before her, and she had to take her turn to get to the elevators, that being a regulation of the railway company, of which all parties were aware.

Not having been loaded by the time fixed, to save her insurance she had to leave without a cargo :—

*Held*, that the defendants' duty was to furnish a cargo at the elevators, which was the only place of loading, and that the contract should be read as if the words "at the usual place" were inserted; that the plaintiffs' contract was to proceed to the usual place of loading, receive the cargo and carry it to the point of destination; that the loading was to be done by noon of the 5th; that the defendants not having done anything to obstruct the vessel in getting to the elevators and the plaintiffs having failed to shew that the defendants were in default. their action should be dismissed.

*Held*, also, that the vessel not having arrived sufficiently in advance to secure her turn in time, the defendants were entitled to such damages as fairly resulted from the breach of the contract and were in contemplation of the parties.

Judgment of MacMahon, J., at the trial, reversed, MACLENNAN, J.A., dissenting. *Midland Navigation Co. v. Dominion Elevator Co.*, 432.

See MUNICIPAL CORPORATIONS, 4.

## SOCIETY.

*Friendly.*]—See INSURANCE, 2.

## SOLICITOR.

*Service of Writ.*]—See PRACTICE, 1, 6.

See CHOSE IN ACTION, 2—PRACTICE, 5—WILL, 5.

## SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 1, 2.

## STATEMENT OF CLAIM.

*Delivery after Defence.*]—See PLEADING, 3.

See PLEADING, 1.

## STATUTE LABOUR.

See ASSESSMENT AND TAXES, 2.

## STATUTE OF LIMITATIONS.

See INTEREST, 2.

## STATUTES.

B.N.A. Act, sec. 91 (29), sec. 92 10a.  
See CONSTITUTIONAL LAW, 2.

42 Vict. ch. 22 (O.).....  
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45 Vict. ch. 67 (D.).....  
See CONSTITUTIONAL LAW, 2.

45 Vict. ch. 71 (O.).....  
See CONSTITUTIONAL LAW, 2.

45 Vict. ch. 95 (D.).....  
See CONSTITUTIONAL LAW, 2.

46 Vict. ch. 24, secs. 14, 15 & 16 (D.)  
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See HUSBAND AND WIFE.

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- R.S.C. 1886, ch. 66, sec. 11, sub-sec. 6..  
*See COSTS*, 4.
- R.S.C. 1886, ch. 129, sec. 13.....  
*See COMPANY*, 2.
- 51 Vict. ch. 29, sec. 131, 158, 278 (D.)..  
*See COSTS*, 4—*RAILWAYS*, 1, 3, 5.
- 55 & 56 Vict. ch. 29, secs. 144 (2),  
196 (a), 198, 209, 210, 210 (2),  
215, 902, sub-sec. 6 (D.) (Crim-  
inal Code).....  
*See CRIMINAL LAW*, 1, 4, 8—*JUSTICE*  
*OF THE PEACE*.
- R.S.O. 1897, ch. 7.....  
*See PARLIAMENT*, 4.
- R.S.O. 1897, ch. 9.....  
*See CRIMINAL LAW*, 3 — *PARLIA-*  
*MENT*, 1.
- R.S.O. 1897, ch. 10.....  
*See MANDAMUS*.
- R.S.O. 1897, ch. 11, secs. 16, 47, 48,  
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Act).....  
*See PARLIAMENT*, 1.
- R.S.O. 1897, ch. 51, sec. 58, sub-sec.  
5, sec. 59, sub-sec. 9 (O.J. Act)....  
*See CHOSE IN ACTION*, 1—*RECEIVER*.
- R.S.O. 1897, ch. 54, secs. 16 and 18..  
*See REGISTRY LAWS*, 2.
- R.S.O. 1897, ch. 60, sec. 79.....  
*See DIVISION COURTS*.
- R.S.O. 1897, ch. 72, sec. 1.....  
*See LIMITATION OF ACTIONS*.
- R.S.O. 1897, ch. 73, sec. 10.....  
*See EXECUTORS AND ADMINISTRATORS*.
- R.S.O. 1897, ch. 95, sec. 3.....  
*See JUSTICE OF THE PEACE*.
- R.S.O. 1897, ch. 96, sec. 9 (3).....  
*See CRIMINAL LAW*, 5.
- R.S.O. 1897, ch. 112, sec. 4.....  
*See WILL*, 3.
- R.S.O. 1897, ch. 124.....  
*See EXECUTION*.
- R.S.O. 1897, ch. 127, secs. 7, 16.....  
*See DEVOLUTION OF ESTATES*, 1 —  
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- R.S.O. 1897, ch. 129, secs. 15, 32 (1) (b).  
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- R.S.O. 1897, ch. 138, secs. 130, 132....  
*See LAND TITLES ACT*.
- R.S.O. 1897, ch. 147, sec. 8 (1).....  
*See BANKRUPTCY AND INSOLVENCY*.
- R.S.O. 1897, ch. 165, sec. 5.....  
*See DOWER*, 2.
- R.S.O. 1897, ch. 171, sec. 6.....  
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- R.S.O. 1897, ch. 199, secs. 11 and 40..  
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- R.S.O. 1897, ch. 203, sec. 151, (Stat.  
Conditions, 19) (a).....  
*See INSURANCE*, 2, 3.
- R.S.O. 1897, ch. 222, secs. 27 to 41....  
*See COMPANY*, 1.
- R.S.O. 1897, ch. 223, sec. 551, 580,  
581, 583, 708.....  
*See INSURANCE*, 2—*MUNICIPAL COR-*  
*PORATIONS*, 2.
- R.S.O. 1897, ch. 224, sec. 18.....  
*See ASSESSMENT AND TAXES*, 1.
- R.S.O. 1897, ch. 245, sec. 4, sub-sec.  
4 and sec. 91, 100, 167, 168 (Liquor  
License Act).....  
*See CONSTITUTIONAL LAW*, 3—*CRIM-*  
*INAL LAW*, 3—*INTOXICATING LI-*  
*QUORS*, 1.
- R.S.O. 1897, vol. 3, ch. 324, sec. 40....  
*See FOREIGN JUDGMENT*.
- 58 Vict. ch. 42, sec. 22 (O.).....  
*See MUNICIPAL CORPORATIONS*, 2.
- 60 & 61 Vict. ch. 18 (D.).....  
*See INTEREST*, 2.
- 62 Vict. (2nd sess.) ch. 6 (O.).....  
*See PARLIAMENT*, 2.
- 63 Vict. ch. 24 (O.).....  
*See EVIDENCE*, 1.
- 63 Vict. ch. 77 (O.).....  
*See RAILWAYS*, 3.
- 1 Edw. VII. ch. 39, sec. 34 (O.).....  
*See SCHOOLS*, 3.
- 2 Edw. VII. ch. 2, sec. 7, sub-sec. 6 (O.)  
*See WILL*, 3.

2 Edw. VII. ch. 12, sec. 15 (O.).....  
*See* MUNICIPAL CORPORATIONS, 2.

2 Edw. VII. ch. 31, sec. 10.....  
*See* ASSESSMENT AND TAXES, 1.

2 Edw. VII. ch. 33, sec. 91 (O.) (Li-  
 quor Act, 1902).....  
*See* MANDAMUS.

3 Edw. VII. ch. 13, sec. 1 (a) (O.).....  
*See* VENUE, 2.

3 Edw. VII. ch. 18, sec. 93.....  
*See* MUNICIPAL CORPORATIONS, 6.

*Construction of—Imperative.]*  
 —*See* ASSESSMENT AND TAXES, 2.

*See* INTEREST.

## STATUTORY CONDITIONS.

*See* INSURANCE.

## STREET RAILWAYS.

*See* ASSESSMENT AND TAXES, 1.

## SUCCESSION DUTY.

*See* WILL, 1.

## SURETY.

*See* PRINCIPAL AND SURETY, 1.

## TAXES.

*See* ASSESSMENT AND TAXES.

## TENANT.

*For Life.]—See* SCHOOLS 2.

*At Will.] — See* LANDLORD  
 AND TENANT.

## TIMBER.

*Assessment of.]—See* INDIAN  
 LANDS.

## TELEPHONE COMPANY.

*See* CONSTITUTIONAL LAW, 2.

## TIME.

*Computation of.]—See* COSTS, 1.

*Extension of.]—See* PARLIA-  
 MENT, 2, 3.

## TORTS.

*Joinder of.]—See* PARTIES, 3.

## TRADE MARK.

*“Cream Yeast”—Infringe-  
 ment—Trade Name—Acquisi-  
 tion of Right by User.]—The*  
 plaintiff in 1877 obtained the  
 registration of a trade mark for  
 a certain kind of yeast which  
 he manufactured and sold, and  
 in 1894 obtained another regis-  
 tration of the same. It consist-  
 ed of a label bearing the repre-  
 sentation of the head and bust  
 of a woman with the words  
 “Dry” and “Hop” on either  
 side and the words “Cream  
 Yeast” below. In 1901 the  
 defendants commenced selling  
 yeast cakes in packages labelled  
 “Jersey Cream Yeast Cake,” the  
 words “Jersey Cream” at the  
 top and “Yeast Cake” at the  
 bottom, with the representation  
 of two Jersey cows and a milk-  
 maid between. The plaintiff did

not use cream in the preparation of his yeast, but the defendants actually used Jersey Cream in theirs:—

*Held*, that the plaintiff's trade mark, if he was entitled to register it, was not infringed by the defendants' label.

*Held*, also, reversing the decision of Street, J., 4 O.L.R. 300, that the plaintiff had not acquired the exclusive right to use the name "Cream Yeast," and was not entitled to have the defendants' restrained from using it. *Gillett v. Lumsden Bros.*, 66.

### TRADERS.

*Transient.*]—See MUNICIPAL CORPORATIONS, 2.

### TRIAL.

*Place of.*]—See CONSTITUTIONAL LAW, 3.

*Application to Fix Day for—Extending Time.*]—See PARLIAMENT, 3.

See CRIMINAL LAW, 6—PRACTICE, 5.

### TRUSTS AND TRUSTEES.

1. *Will—Appointment of New Trustee—Construction—Survivorship.*]—A testator appointed two of his brothers executors and trustees of his will, and provided that in the event of either dying "then my surviving brothers and sisters or a majority of them shall appoint a new trustee." He

died in 1899, and afterwards, in the same year, one of the executors died, and also another brother. In 1900 a majority of the brothers and sisters still living appointed the plaintiff trustee in place of the deceased trustee:—

*Semble*, that the appointment was valid, for that it was the survivors of the brothers and sisters at the time of exercising the power to appoint who were entitled to exercise the power. *Saunders v. Bradley*, 250.

2. *Shares—Modification of Judgment.*]—On an appeal to the Court of Appeal the judgment of the Divisional Court was amended as to certain of the shares and as to costs. In other respects the appeal was dismissed with costs, without prejudice to another action being brought as to these shares for moneys advanced thereon. *Birkbeck Loan Co. v. Johnston et al.*, 258.

3. *Misappropriation by Co-executor—Negligence—Delay—Trustee Act, R.S.O. 1897, ch. 129, sec. 32 (1) (b).*]—Plaintiff's testator died in 1870, having by his will given the income of his estate to his widow for life and, subject to certain bequests, the residue to the children of his brothers and sisters, and appointed two executors and the widow executrix of his will. One of the executors managed the estate until the time of his death in 1885, by which date some of the real estate had been

disposed of and the proceeds invested, and his management was duly accounted for. The surviving executor then managed the estate until 1895, when the widow took proceedings against him for an account, the result of which was he was found largely indebted and unable to pay the amount. The widow died in 1902, probate of her will was then granted to the defendants, and the surviving executor of the testator was removed as trustee and the plaintiffs appointed in his place.

In an action by the plaintiffs against the defendants in 1903 to compel them to make good the losses to the estate of their testator occasioned by the negligence of the widow executrix in permitting her co-executor to misappropriate the funds of the estate:—

*Held*, that, whatever might be the rights of those entitled in remainder, as all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, sec. 32 (1) (b) of the Trustee Act, R.S.O. 1897, ch. 129, was a good defence to an action by the trustees.

*Re Bowden, Andrew v. Cooper* (1890), 45 Ch. D. 444, commented on and followed. *Gardner v. Perry*, 269.

4. *Trusts and Trustees—Investments—Realization—Tenants for Life—Remaindermen—Apportionment—Election—Rate of Interest.*]—A testa-

trix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue after payment of debts, etc., should be divided equally among her four children, three daughters and one son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the trustees under which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease, renewable. When the lease expired in 1893 it was renewed for 21 years at \$1,850 a year. The lessee made default in 1894, and the trustees took possession of the land and building, but for a number of years were unable to obtain an adequate rental or make a sale. In November, 1902, a sale was effected for \$47,500:—

*Held*, following *Re Cameron* (1901), 2 O.L.R. 756, that the



life tenants were entitled to some portion of this sum.

But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants then, in effect, elected to treat this property as a satisfactory investment.

The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest.

*Walters v. Solicitor for the Treasury*, [1900] 2 Ch. 107, followed.

An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced \$47,500 on the 15th November, 1902, interest being calculated at  $4\frac{1}{2}$  per cent. per annum with half-yearly rests, and credit being given for the sums actually received by the life tenants from the rents accruing during that period. *Re Clarke, Toronto General Trusts Corporation v. Clarke*, 551.

See INTEREST, 1.

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### USER.

*Acquisition by.*—See TRADE MARK.

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### VENDOR AND PURCHASER.

1. *Offer to Sell*—*Purchaser Pendente Lite*—*Certificate of Lis Pendens*—*Registration*—*Specific Performance*—*Delay*—

*Damages.*—A letter by the vendor's agent to a probable purchaser giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and upon the person so written to stating that he will buy at the price named a contract of sale and purchase is constituted between the parties.

After the contract for sale had been entered into the vendor sold and conveyed the land in question, which was of a speculative character, to a third person, who purchased in good faith and without notice of the prior contract. Before he registered his deed the original purchaser began this action for specific performance and registered a certificate of *lis pendens*, but, although, he knew of the second sale, he did not take any step in the action, or make the second purchaser a party, for nearly twelve months:—

*Held*, (1) following *Sanderson v. Burdett* (1869), 16 Gr. 119, that the second purchaser's rights were not affected by the registration of the certificate; and (2) that in any event the delay would have been fatal to the claim for specific performance as against him.

The vendor having deliberately broken his contract because of a better offer substantial damages were assessed

against him. *Clergue v. McKay*, 51.

2. *Oral Contract for Sale and Purchase of Land — Specific Performance — Statute of Frauds—Part Performance—Possession—Note or Memorandum — Delivery of Deed in Escrow.*]—Specific performance of an oral contract for the sale and purchase of land was adjudged at the suit of the vendee, who had gone into possession of the land on the faith of the contract and openly and continuously for some time remained in visible possession by his tenants, to the knowledge of the vendors and without objection on their part. It was considered that, under the circumstances, possession should be assumed to have been taken with the assent of the vendors, and the possession was of such a character as to exclude the operation of the Statute of Frauds.

*Quære*, whether a conveyance of land executed and delivered in escrow and retained in the vendor's own possession, to be handed to the vendee on payment of the purchase money but not purporting to be made in pursuance of a previous agreement, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed.

*Gillatley v. White* (1870), 18 Gr. 1, and *Phillips v. Edwards* (1864), 33 Beav. 440, considered.

Judgment of Robertson, J., affirmed on the above ground. *McLaughlin v. Mayhew et al.*, 174.

*Purchaser for Value.*]—See DOWER, 2—LAND TITLES ACT—REGISTRY LAWS, 1.

See TRUSTS AND TRUSTEES, 2.

## VENUE.

1. *Cause of Action — Con. Rule 529 (b)—Declaratory Action.*]—"Cause of action" in Con. Rule 529 (b), means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience.

*Quære*, whether an action for a declaration of right falls within the Rule? *Conner v. Dempsster*, 354.

2. *Change of—Contract Giving Jurisdiction Where Plaintiff's Head Office is.*]—In an action brought in the county court of the county where the plaintiff's head office was located, on an agreement which contained a provision "that on default in payment suit therefor may be entered, tried and finally disposed of in the Court where the head office of the company is located," a motion to change the venue to another county was refused on the grounds that the word "Court" is to be under-

stood as meaning "the Court having jurisdiction" mentioned in sec. 1 (a) of 3 Edw. VII., ch. 13 (O.), and should be construed in reference to the contract in which it occurs; and that the parties had agreed that, in case of litigation, the suit should be carried on in the Court, whether high court, county court, or division court, having jurisdiction in the locality where the head office was. *Noxon Co. (Limited) v. Cox*, 637.

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**VOTER.**

See CRIMINAL LAW, 3.

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**VOTERS' LISTS.**

See PARLIAMENT, 4.

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**WAIVER.**

See INSURANCE, 1—INTEREST,  
2—MUNICIPAL CORPORATIONS, 1.

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**WARRANT.**

*Of Commitment.*]—See CONSTITUTIONAL LAW, 3.

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**WARRANTY.**

See INSURANCE, 4—SALE OF  
GOODS.

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**WIFE.**

See HUSBAND AND WIFE.

**WILL.**

1. *Devise of Debentures—Specific Legacy—Succession Duty.*]

—A testator possessed of a considerable number (more than 5) of \$1,000 debentures, bearing interest at four per cent. of a certain city, both at the time of making a codicil to his will and at the time of his death, by the codicil devised to each of two devisees "one debenture of" (the city) "for the sum of \$1,000 bearing interest at four per cent. per annum;" and directed that if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of the five named persons one debenture for the sum of \$1,000 bearing interest at four per cent.:

*Held*, that the legacies to the two legatees were not specific legacies; and that even if they had been, the legatees were not entitled to receive them free of succession duty which the executors should either deduct or collect the duty before payment. *Re Mackey*, 292.

2. *Construction — Direction to Keep and Maintain.*]

—A testator directed his sons, to whom he devised his farm, to keep their sisters, until they married, in a suitable manner free of expense, and that so long as they, or either of them, kept house for their brothers, they or she

were to have control of the poultry, eggs, butter, etc., and all monies thence derived, for their own use and benefit. The sons were compelled to sell the farm, which was heavily encumbered:—

*Held* (affirming the decision of Street, J.) that the sons were bound to offer to support and maintain the sisters, either on the farm devised, or in the home of one of them, but that they were not bound to allow them to reside wherever the latter wished, and pay the cost of their maintenance. *Re O'Shea*, 315.

3. *Charitable Devises and Bequests—Designation of Beneficiaries — Perpetuities — Mortmain Acts.*—Testator bequeathed all his property “to that Presbyterian congregation where I belong to and had my first communion, Churchtown, . . . Ireland. The presiding clergyman, committee, and elders to have full control of all after me. They shall have the power to sell or rent to the best advantage. . . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, committee, and ruling elders having succeeding authority to remember the poor of the church at Christmas every year and to cheer the poor and the broken hearted with the joy of Christ's death and suffering, together with the presents pre-

sented by the minister, committee, and ruling elders at the Christmas time every year.” By a codicil he appointed two persons executors and trustees and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months after making the will and codicil, leaving both real and personal property:—

*Held*, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently designated, and came within the meaning of sec. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. ch. 2 (O.); and, the gifts being charitable, the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect.

*Held*, also, that the word “assurance” in sub-sec. 6 of sec. 7 of that Act refers to a deed, not to a will, and, therefore, leaves sec. 4 of R.S.O. 1897, ch. 112, untouched, and under that section a devisee in favour of a charity is good though made within six months before testator's death. *Re Kinny*, 459.

4. *Construction*—“*Dying Without Heirs.*”—A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain legacies and charges, and “in the event of her dying without heirs” then to the testator's brothers and sisters:—

*Held*, that the ulterior devisees



being so related to the first devisee as to be in the course of descent from her the "heirs" of the first devisee must be construed to be "heirs of the body" and, therefore, that as to the realty the daughter took an estate tail, and as to the personality an absolute estate.

Judgment of Falconbridge, C.J., K.B., varied. *Re McDonald*, 478.

5. *Probate—Lost Will—Evidence—Solicitor—Privilege—Declarations.*]—The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence.

Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn and was claiming large benefits under the will in question, which, it was alleged, had been lost or stolen.

The facts that the testator was aware that unless he made a will his property would go

to the Crown; that he was an experienced man of business, possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days duration, he had expressed no wish to make a will, were held sufficient to rebut the presumption of destruction of the will by the testator.

Judgment of MacMahon, J., affirmed. *Stewart v. Walker*, 495.

6. *Power to Sell "or Dispose"—Power to Exchange.*]—A testator devised her real estate to be equally divided between her children when the youngest of them attained 21 with a power to the executor "to sell or dispose of any or all of the above real estate should he think it to the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales:"—

*Held*, that the executor had no authority to exchange the lands of the testatrix for other lands. *Re Confederation Life Association v. Clarkson*, 606.

7. *Construction—Residuary Bequest—"Personal Effects"—Mortgage—Debts and Expenses of Administration—Ratable Charge on Real and Personal Estate.*]—A will was in part as follows: "My will is first that all my just and lawful debts

and funeral expenses be paid by my executors . . . and the residue of my estate, real and personal, which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give devise and bequeath as follows: I give devise and bequeath absolutely to my beloved wife . . . all my furniture books plate and other personal effects and so long as she remains my widow but no longer I give devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children.

The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate:—

*Held*, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things *ejusdem generis* with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate.

*Held*, also, following *Re Thomas* (1901), 2 O.L.R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administra-

tion of his estate should be charged ratably upon his real estate and personal estate according to their respective values: *Devolution of Estates Act*, R.S.O. 1897, ch. 127, sec. 7. *Re Way*, 614.

#### 8. Construction—*Legacies—Payment out of Real Estate.*—

A testator by his will devised a farm to each of his sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters and proceeded as follows:—"I give to my wife all the moneys that remains after paying my former bequeaths, debts and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living:—

*Held*, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville v. Browne* (1859), 7 H.L.C. 689, and that, the undisposed of personal estate being insufficient to pay them,

the legacies to the daughters could not be paid out of the undisposed of real estate.

Judgment of Teetzel, J., affirmed. *Re Bailey*, 688.

9. *Construction — Devise — Absolute Gift — Conditional Gift over—Validity—Disposition of Corpus—Income—Executor.*]—A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty:—

*Held*, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. *Re Deller*, 711.

*Appointment of Trustee.*]—*See* TRUSTS AND TRUSTEES, 2.

## WINDING UP.

*See* COMPANY, 1, 2, 3.

## WORDS.

"*Abandon.*" ]—*See* COSTS, 4.

"*Actual Notice.*" ]—*See* INDIAN LANDS.

"*Assurance.*" ]—*See* WILL, 3.

"*At the Usual Place.*" ]—*See* SHIP.

"*Butcher.*" ]—*See* MUNICIPAL CORPORATIONS, 2.

"*Cause of Action.*" ]—*See* VENUE, 1.

"*Cream Yeast.*" ]—*See* TRADE MARK.

"*Debt or Liquidated Demands.*" ]—*See* JUDGMENT.

"*Desist.*" ]—*See* COSTS, 4.

"*Dying Without Heirs.*" ]—*See* CHOSE IN ACTION, 4.

"*Euchre.*" ]—*See* INTOXICATING LIQUORS.

"*In respect of a Certain Contract.*" ]—*See* CHOSE IN ACTION, 4.

"*Necessaries.*" ]—*See* CRIMINAL LAW, 4.

"*Personal Effects.*" ]—*See* WILL, 7.

*"Recover Possession."*—See  
DISTRICT COURTS.

*"Rolling Stock, Plant and  
Appliances."*—See ASSESSMENT  
AND TAXES, 1.

*"Superstructure."*—See AS-  
SESSMENT AND TAXES, 1.

*"To Sell or Dispose."*—See  
WILL, 6.

*"Wilfully."*—See JUSTICE OF  
THE PEACE.

*"Without Reasonable and  
Probable Cause."*—See JUSTICE  
OF THE PEACE.

*"Work for the General Ad-  
vantage of Canada."*—See  
CONSTITUTIONAL LAW, 1.

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#### WRIT OF SUMMONS.

See PRACTICE, 1, 2, 4, 6, 7, 8,  
10—REGISTRY LAWS, 1.

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